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COURT CAPTION.

September 25, 1944.

Being the Fourth Monday of September, 1944.

Be It Remembered That at a District Court of the United States Begun and Held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, Within Said District and the Sixth Circuit, on the Fourth Monday, It Being the 25th Day of September, 1944.

Court Met Pursuant to Adjournment for the Middle District of Tennessee When the Following Proceedings Were Had, To-Wit:

Present L. B. Ormes, Clerk, and Reed Sharp, United States Marshal, for the Middle District of Tennessee:

The regular (statutory) September 1944 Term of Court for the Nashville Division for the Middle District of Tennessee was duly opened and adjourned until 10:00 O'clock A. M. October 2, 1944, at which time the trial of cases for said term will commence.

Complaint

In the

DISTRICT COURT OF THE UNITED STATES

For the Middle District of Tennessee

Nashville Division

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,
v.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Defendant.

Civil Action File No. 524

COMPLAINT.

(Filed December 19, 1944.)

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation existing by virtue of the laws of the State of Tennessee, having its principal office at 930 Broad Street, city of Nashville, State of Tennessee, within the jurisdiction of this Court. Defendant is, and at all times hereinafter mentioned was, engaged in the operation, as

essential instrumentalities of interstate commerce, of a railway system, shops, yards, terminals, offices, and other railway facilities in several States, including Tennessee, Alabama, Georgia and Kentucky, which were regularly engaged in the interstate transportation of passengers, freight, mail, express, and baggage, and which were operating in interstate commerce to and from States other than the State of Tennessee, and in furnishing railroad terminal facilities to other railroads engaged in interstate commerce.

IV.

Defendant is, and at all times hereinafter mentioned was, employing approximately 12,000 employees in and around its railway system, shops, yards, terminals, offices, and other railway facilities in the operation, as essential instrumentalities of interstate commerce of such railroad system, terminals, shops, and offices. Substantially all of the duties performed by defendant's employees are essential to the movement in interstate commerce of locomotives, cars, trains, persons, freight, express, mail, and baggage in the active course or transportation to and from other States, and are an essential and integral part of interstate commerce.

V.

Defendant repeatedly violated and is violating the provisions of Sections 6 and 15 (a) (2) of the Act by paying to a number of its employees for their employment in interstate commerce, as aforesaid, wages at rates less than 30 cents an hour from October 24, 1940, to March 1, 1941; less than 36 cents an hour from March 1, 1941, to August 31, 1942; and since August 31, 1942, less than 40 cents an hour, said rates of 36 cents and 40 cents an hour being the minimum wage rates made applicable to the defendant's employees by the two wage orders for the Railroad Carrier Industry heretofore promulgated pursuant to Sections 5 and 8 of the Act by the Administrator of the Wage and Hour Division, United States Department of Labor, and which, after publication in the Federal Register, be-

came effective respectively on March 1, 1941, and August 31, 1942. Copies of said wage orders are hereto attached as exhibits A and B.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act, in that since October 24, 1940, it has failed to make, keep, and preserve adequate and accurate records of its said employees referred to as "cubs" and "trainees" as to the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and the total hours worked each workweek.

VIII.

The violations alleged in paragraphs V and VII hereof occurred with reference to approximately 225 of defendant's employees, including firemen, switchmen, stenographers, yard clerks, office clerks, messengers, callers, and porters during so-called "training periods" ranging from two or three days to several weeks, during which time said employees are actively engaged in the performance or operation of some essential phase of defendant's ac-

tivities or facilities, but receive no compensation for their employment, are not listed or carried on defendant's pay rolls, and no records are kept by the defendant of their hours of work or conditions of employment.

Employees designated as "trainees" or "cubs" upon applying for employment with the defendant are required by defendant to learn the duties of the job for which they apply under the supervision of an experienced employee of defendant by observation and by performing the manual, physical or clerical work concerned with the job for which they apply, during which time no compensation is paid to such employees. Upon becoming familiar with the duties of his position, and in some cases passing an examination concerning those duties, the so-called "trainees" or "cubs" are placed upon the pay roll of defendant and paid at the established rate for a person in that position. In the case of firemen and switchmen in the event the employee completes the so-called training period and is placed upon the pay roll he is paid $5 per day for each day of his so-called training period. The other employees referred to receive no compensation whatever for the time spent and the hours worked during the so-called "training period," and the firemen and switchmen if they should quit before completing the so-called "training period" in most cases receive no compensation for the time spent and the hours worked in the uncompleted so-called "training period."

IX.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its be-

half and interest, from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

DOUGLAS B. MAGGS,
Solicitor of Labor.
ARCHIBALD COX,
Associate Solicitor.
JETER S. RAY,
Regional Attorney.
PAUL M. CADRA,
Associate Attorney.

Post Office Address:
c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tennessee,
or
Solicitor of Labor,
U. S. Department of Labor,
Washington, D. C.

Attest: A True Copy.

L. B. ORMES, Clerk,
U. S. District Court,
Middle District of Tennessee.
By INEZ SHELTON, D. C.

(Seal)

Exhibit "A" to Complaint

EXHIBIT "A".

For Release Friday, February 14, 1941. **R-1277**

**U. S. Department of Labor,
Wage and Hour Division,
Washington.**

Title 29—Labor.

Chapter V—Wage and Hour Division.

In the Matter of the Recommendations of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry

Wage Order.

Effective March 1, 1941.

Part 591—Minimum Wage Rates in the Railroad Carrier Industry.

Whereas, on November 2, 1939, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 34, appointed Industry Committee No. 9 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

Whereas, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

Whereas, on August 15, 1940, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing the recommendations for

a 36 cent per hour minimum wage rate in the Trunk Line Division of the Railroad Carrier Industry, and for a 33 cent per hour minimum wage rate in the Short Line Division of the Railroad Carrier Industry; and

Whereas, after notice published in the Federal Register on August 23, 1940, Henry T. Hunt, Esquire, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at Washington, D. C., on September 23 and 24, 1940, at which all interested persons were given an opportunity to be heard; and

Whereas, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas, all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before November 18, 1940; and

Whereas, oral argument was held on November 25, 1940, before the Administrator; and

Whereas, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 34, are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

Whereas, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendations of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, Washington, D. C.;

Exhibit "A" to Complaint

Now, Therefore, It Is Ordered That

Section 591.1 Approval of Recommendations of Industry Committee

The Committee's recommendations are hereby approved, and, in accordance with such recommendations,

Section 591.2 Wage Rates

(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Trunk Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce;

(b) Wages at a rate of not less than 33 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Short Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

Section 591.3 Posting of Notices

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

Section 591.4. Definition of Railroad Carrier Industry and Divisions thereof

The Railroad Carrier Industry and the divisions thereof to which this Order shall apply are hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or car-

rier by railroad, subject to Part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interburban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(a) The term "Trunk Line Division," as used in this Order, means the industry carried on (1) by an express company, switching company, terminal company or sleeping car company subject to Part I of the Interstate Commerce Act, (2) by any carrier by railroad subject to Part I of the Interstate Commerce Act having annual operating revenues of more than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and (3) by any company which is directly or indirectly owned or controlled by one or more such carriers, by one or more carriers under (b) hereof or by one or more such carriers jointly with one or more carriers under (b) hereof or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and

the casual operation of equipment or facilities), in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Trunk Line Division" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power;

(b) The term "Short Line Division," as used in this Order, means the industry carried on by any carrier by railroad, subject to Part I of the Interstate Commerce Act, having annual operating revenues of less than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such carrier by railroad: Provided, however, That the term "Short Line Division" shall not include the industry carried on (1) by any carrier or company included within paragraph (a) hereof or (2) by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Exhibit "B" to Complaint

Section 591.5. Effective Date.

This Wage Order shall become effective March 1, 1941.

Signed at Washington, D. C., this 12th day of February, 1941. Sections 591.1 to 591.5 inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U. S. C., Sup. IV, 208.

PHILIP B. FLEMING,
Administrator,
Wage and Hour Division,
U. S. Department of Labor.

Published in Federal Register, February 14, 1941.

EXHIBIT "B".

For Release Saturday
August 15, 1942

R-1848

U. S. Department of Labor
Wage and Hour Division

Title 29—Labor

Chapter V—Wage and Hour Division

In the Matter of the Recommendations of Industry Committee No. 44 for Minimum Wage Rates in the Railroad Carrier Industry

Wage Order

Effective August 31, 1942

Part 624—Minimum Wage Rates in the Railroad Carrier Industry.

Whereas, on April 4, 1942, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 147, appointed Industry Committee No. 44 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage

rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

Whereas, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

Whereas, on April 29, 1942, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing its recommendations for a 40 cent per hour minimum wage rate in the Railroad Carrier Industry; and

Whereas, after notice published in the Federal Register on June 23, 1942 Major Robert N. Campbell, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at New York, New York, on July 15, 1942, at which all interested persons were given an opportunity to be heard; and

Whereas, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas, although all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before August 5, 1942, no briefs were filed; and

Whereas, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 147 are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

Whereas, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Adminis-

trator in the Matter of the Recommendations of Industry Committee No. 44 for a Minimum Wage Rate in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, 165 West 46 Street, New York, New York.

Now, Therefore, It Is Ordered That

Section 624.1 Approval of Recommendations of Industry Committee.

The Committee's recommendations are hereby approved, and in accordance with such recommendations,

Section 624.2 Wage Rate.

Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

Section 624.3 Posting of Notices.

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

Section 624.4 Definition of Railroad Carrier Industry.

The Railroad Carrier Industry to which this Order shall apply is hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or carrier by railroad, subject to Part I of the Interstate Com-

merce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Section 624.5 Effective Date.

This Wage Order shall become effective August 31, 1942.

Signed at New York, N. Y. this 13th day of August, 1942. Sections 624.1 to 624.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U. S. C., Sup. IV, 208.

L. METCALFE WALLING,
Administrator,
Wage and Hour Division,
U. S. Department of Labor.

Published in Federal Register August 15, 1942.

Summons

SUMMONS.

(Issued December 21, 1944.)

DISTRICT COURT OF THE UNITED STATES

for the
Middle District of Tennessee,
Nashville, Division

Civil Action File No. 524

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Defendant

} Summons

To the above named Defendant:

You are hereby summoned and required to serve upon Hon. Jeter S. Ray, Regional Attorney, Wage & Hour Division, plaintiff's attorney, whose address is—

% Wage & Hour Division,
Medical Arts Building,
Nashville, Tennessee.

an answer to the complaint which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

L. B. ORMES,
Clerk of Court.

By /s/ H. LONDON,
Deputy Clerk.

Date: December 21st, 1944 [Seal of Court]

Return on Service of Writ.

Nashville, Tennessee

I hereby certify and return, that on the 21st day of December, 1944, I received the within summons executed same by reading and leaving a copy of summons and complaint with W. H. Swiggart, Gen. Counsel for N. C. & St. L. Ry., This December 21st, 1944.

REED SHARP,
United States Marshal.

By /s/ GEORGE BRAGG,
Deputy United States Marshal.

Marshal's Fees

Travel	**$ .06**
Service	**2.00**
	2.06

Subscribed and sworn to before me, a ..... this ..... day of ..... 19...

[Seal]

.....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

ANSWER.

(Filed January 9, 1945.)

I.

Defendant admits the allegations contained in Paragraphs I, II, III, and IV of the Complaint.

II.

Defendant denies the allegations contained in Paragraph V of the Complaint.

III.

Further answering Paragraph V, defendant avers that at all times since the effective date of the Fair Labor Standards Act it has endeavored carefully and in good faith to comply therewith. From time to time defendant has authorized and permitted applicants for employment as clerks, messengers, callers and office porters to familiarize themselves with its method of work and assignment to enable them to qualify in the positions for which they sought employment. This has been done by permitting them to acquaint themselves with the work and duties of employees who were paid to do the particular work with respect to which instruction was sought by applicants. For example, an applicant for position as messenger has been permitted to accompany a regularly assigned and paid messenger to acquaint himself with the route and the assignments of such messenger, and an applicant for the position of yard clerk has been permitted to accompany a regularly assigned and paid yard clerk to acquaint himself with the duties and assignments of such clerk. In all such cases the applicant has been a student and observer of a specific employee or employees who has been paid to do the particular work. Prior to the effective date of the Fair Labor Standards Act these applicants were not compensated during such period of training. This period of training, or "posting" as it has been generally known in the railroad industry, was brief and averaged only a few days.

When the Fair Labor Standards Act became effective, defendant's Management recognized the possibility that

such applicants on rare occasions might perform a beneficial service for defendants at the same time that the regular employees were doing a similar but not identical assignment. In a bona fide effort to avoid any possible violation of the Act, defendant's Management elected and proceeded to treat such applicants as if subject thereto. The various divisional superintendents and other supervisory officials of defendant were instructed to pay student clerks, messengers, callers and office porters wages in conformity with the Act and to keep records as prescribed pursuant to the Act.

So far as the Management of defendant knew these instructions were understood and were being observed. However, when a suit similar in all respects to the present one was filed by the Administrator of the Wage and Hour Division against defendant at Chattanooga, Tennessee, on November 29, 1944, (later dismissed for reasons of venue with the present suit filed at the time of such dismissal) defendant's Management discovered on information furnished by representatives of the Wage and Hour Division that at one point only, to wit, Cravens Yard at Chattanooga, Tennessee, the Chief Clerk in the office there had permitted individuals to post or train for positions as clerks, porters, callers and messengers without compensation during the period of "posting." Defendant's Management promptly reprimanded such Chief Clerk, directed that this local practice at Chattanooga be discontinued immediately and proceeded voluntarily to make payments to those persons who had trained or "posted" without compensation. Defendant avers that its practice at Chattanooga, carried on by subordinates without knowledge of its Management or even of its Superintendent for the Chattanooga Division, has been changed and that no injunction to restrain future violations is either necessary or justified.

IV.

Further answering Paragraph V, defendant avers that for the purposes of training applicants for employment as firemen, brakemen and switchmen, the facts with respect to defendant's past and present practices are as follows:

Answer

It is the practice of defendant and of railroads generally, to require that all applicants for employment as firemen, brakemen and switchmen in yard or road service shall first undergo a training period to learn the duties and activities of the position they seek. Except as hereinafter explained, no compensation has been paid to such trainees, who are usually called "cubs." In the case of such trainees there is no school or other institution in which training for such occupation can be had and obtained. The training of such applicants is for the safety of the men themselves, for the safety of the public, for the protection of life and property and to teach trainees to meet the standards of safety and knowledge required in the operation of a railroad, thereby making it possible for them to become employees.

Trainees are applicants for employment and are licensed and admitted upon the trains and premises of defendant for the purpose of learning the duties and activities of the respective occupations for which they have applied for employment. Prior to December 1, 1943, such trainees were expressly informed they would not be compensated and were not employees; from and after December 1, 1943, such trainees were informed that they would be compensated as set forth in Paragraph V hereof.

The training period of these trainees is brief and the number of trainees in relation to the number of persons employed in the respective occupations is quite small. The average time from beginning of training until qualification is approximately 21 days for persons seeking employment as firemen or brakemen in road service and less than one week for persons seeking employment as firemen or switchmen in yard service. The length of training period depends entirely upon the aptitude, ability, prior experience and industry of the trainee himself. Defendant requires no set period.

Trainees are assigned to train with experienced and paid crews in road service consisting of an engineer, fireman, conductor, and at least two brakemen or in switching service consisting of a conductor (or foreman), two switch-

men, an engineer and fireman. The trainee learns by observation and at his option by performing the manual or physical work which he will be required to do upon becoming a regular employee. Such training is done under the supervision of the members of the crew performing the character of work in which the trainee is being instructed. The time of trainees is spent in observation and in receiving instructions. The Trainee is placed in a position where he can learn by precept and example. He has no duty and no responsibility. The regular crew have the duty and responsibility. The trainees represent additional men over and above the normal complement of a crew which is required despite the presence of trainees. Defendant does not receive any productive work from such trainees. Any manual activity of trainees is in the course of instruction, for which activity defendant has and does compensate the regular crew and which the trainee does as a volunteer student for the purpose of learning under the direction of employees paid to do the same.

Trainees are assigned no regular time at which to report for training or hours in which to carry out the training routine. The general practice is for the trainee to report at the beginning of a shift to a particular crew, to exhibit his permit to receive instructions and to receive his training. The trainee is free to select such time each day as best suits his convenience.

Before the trainee can qualify as an employee it is necessary for him to pass an examination concerning the rules and regulations of defendant with respect to the operation of trains and switching movements. After evidencing his ability to do the work and passing the required examination the trainee becomes qualified for employment and entitled to the full contractual wage rate of the position for which he has qualified, which compensation is far in excess of the requirements of the Fair Labor Standards Act. When trainees qualify and are accepted for employment they receive the same compensation as experienced and skilled employees doing the same work, although their training and skill is only rudimentary and many months

of experience are required to develop such individuals as skilled and efficient employees.

Defendant has never considered such trainees to be employees until after the training period has been completed and until the trainee has qualified to begin his first day's assignment. Under defendant's practices and under its labor agreements the trainee has no status as an employee and does not go on the seniority list as an employee until after the training period has been completed. The training practice followed by defendant is one of long standing custom in the railroad industry and has been followed generally throughout the United States for many years. Such training practice is conducted in good faith, the attendance of the trainees is voluntary, the trainees perform no productive work in the course of training and the training fits the trainees for a new, different and additional skill.

V.

The foregoing statement discloses defendant's practices as to trainees prior to December 1, 1943, and is defendant's present practice except as now explained.

The number of trainees in relation to the number of employees has always been small and has never been larger than the number who it was reasonably anticipated might be employed in the immediate future following their qualification. When the manpower shortage threatened to become acute due to the war, it was recognized that an additional incentive to trainees might help to increase the number of them and thus to alleviate a threatened shortage of railroad employees in train service. A joint committee of labor representatives and of railroad executives had been created to consider the manpower problem and to make recommendations. One of its recommendations made in 1943 was that as an aid to obtain necessary manpower the railroads should consider making payment "to men during pre-employment training periods."

In November 1943, defendant adopted the recommended practice effective December 1, 1943, of paying trainees the

sum of $5.00 per day for each day spent in training. This was done at a time when the men available for training were in nearly all cases married men with families or other dependents. Despite the attractiveness of prospective lucrative employment such men with dependents often could not afford a limited period of training without income unless their expenses in whole or in part were defrayed while training. Trainees were informed that these incentive payments were not to be made if they started the training period and then voluntarily abandoned it to accept employment elsewhere or otherwise. In some instances trainees since December 1, 1943, have abandoned such training and have not received the payment of $5.00 per day through no fault of defendant. In the majority of cases since December 1, 1943, trainees have received $5.00 per day for each day of their training period.

VI.

Defendant admits the allegations in Paragraph VI of the Complaint.

VII.

Defendant denies the allegations of Paragraphs VII, VIII and IX of the Complaint and for further answer thereto refers to the matters set forth hereinabove.

Wherefore, defendant, having fully answered the Complaint, prays that the same be dismissed at plaintiff's cost.

/s/ WM. H. SWIGGART,
/s/ WALTON WHITWELL,
/s/ EDWIN F. HUNT,
930 Broad Street,
Nashville, Tennessee,
Attorneys for Defendant.

I hereby certify that on January 8, 1945, I deposited in the Unted States mail at Nashville an envelope properly sealed and stamped addressed to Hon. Jeter S. Ray, Regional Attorney, Wage and Hour Division, Medical Arts Building, Nashville, Tennessee, which contained a true and complete copy of the foregoing answer.

COURT CAPTION.

January 22, 1945,
Being the Fourth Monday of January, 1945.

Be It Remembered, That at a District Court of the United States Begun and Held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, Within Said District and the Sixth Circuit, on the Fourth Monday, It Being the 22nd Day of January, 1945, Court Met Pursuant to Adjournment. Present and Presiding the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, When the Following Proceedings Were Had, To-wit:

PRE-TRIAL DEPOSITION OF JOHN HARRISON WHITTEN, GENERAL YARD MASTER.

Depositions of witnesses tal n on behalf of plaintiff on the 8th and 9th days of May, 1945, beginning at 10:20 o'clock in the forenoon at the offices of Spurlock & Spear in Chattanooga, Hamilton County, Tennessee, before Joe Hunter, Notary Public in and for Hamilton County, Tennessee, pursuant to the Federal Rules of Civil Procedure, by agreement of the parties in the above-styled cause: present, Walton Whitwell, Esquire, and J. E. Hill, Esquire, counsel for defendant, and George W. Jansen, Esquire, and Paul M. Cadra, Esquire, of counsel for plaintiff; by consent of the parties the same was taken in shorthand and transcribed by Francis J. McSwiggan, Court Reporter.

Mr. Whitwell: All formalities and technicalities waived except that both parties reserve the right to make such objections to depositions as would be available in court.

Mr Jansen: That is correct; the parties waive the signing of the depositions by the witnesses and agree that the Notary Public need not be present during the examination.

The first witness, JOHN HARRISON WHITTEN, after being duly sworn, testified as follows:

Direct Examination,

By Mr. Cadra:

Q. State you full name, Mr. Whitten.

A. John Harrison Whitten.

Q. Where do you live?

A. 2202 Vance Avenue, Chattanooga.

Q. You are presently employed by the N. C. & St. L. Railway?

A. That's right.

Q. In what capacity?

A. General yard master.

Q. How long have you been employed by the N. C. & St. L.?

A. Twenty-nine years.

Q. What are your general duties as a general yard master?

A. The duties are such that I have jurisdiction over the Chattanooga terminals.

Q. Are you also responsible for the hiring of new employees?

A. Yes, I hire all the switching crews.

Q. Any other class of crews that you hire?

A. That is about the only one that I would hire.

Q. Do you also have occasion to dismiss employees, switching employees, if that becomes necessary?

A. Yes.

Q. When a prospective employee applies to you for a position as a switchman, what is the general procedure through which you go; in other words, do you have him file an application?

A. Yes, we have an application filled and we get his reference from whoever he gives us his reference, and if his references are good from his former employers, we then send him to the doctors for a physical examination and if he passes the examination all right, we put him to cubbing with the regular crews until such time as he is

able to take a job as switching or whatever job he is applying for, which in this case would be switching.

Q. Mr. Whitten, I hand you herewith a form which is entitled, Form 284 revised 7-19-29, and I ask you to tell me whether that is the form of application which you now use, or if it isn't the application now used, tell when you used it.

A. Yes, this is the form that we are using; this is the one form which we have been using.

Q. Mr. Whitten, I hand you herewith another form which is entitled Form 284 revised 10-1-43, and ask you to look it over and tell me whether you have ever used this form, and if so, when.

A. This form was put out to be used several months ago, I don't remember the exact date on it, but due to the prospective employees, they would not fill them out; we would give them these forms to fill out and that is the last we would see of them. They would not fill them out and bring them back; there was so much to it that they would not go through the rigmarole of filling out these forms. In a number of cases we would give them to the employees to fill them out and that is the last we would see of him or the form either. We have never had those returned properly filled out.

Q. Mr. Whitten, do I understand you to say you are presently using the form which is dated July 19, 1929, rather than the form which is dated October 1, 1943?

A. That's right.

Q. Will you introduce the form 284 revised, dated July 19, 1929, as Exhibit No. 1 to your deposition?

A. Yes.

Q. Will you introduce in evidence the form 284 revised October 1, 1943, as Exhibit No. 2 to your testimony?

A. Yes.

Q. You state that upon an employee filing the application he is referred to a doctor for a physical examination?

A. That's right.

Q. Is he charged a fee for that?

A. I suppose so.

Q. Do you know how much he is charged?

A. It is two dollars, I believe; I am not positive.

Q. Is the employee reimbursed, or the applicant reimbursed for the two dollars?

A. I couldn't say whether he is or not.

Q. Does the applicant at the time he is examined by the doctor also have to take some vaccination shots?

A. Well, I couldn't say what the outcome of the doctor's examination would be.

Q. Does the company require the applicant to not only undergo a physical examination, but also to take some vaccination of any type?

A. Well, we require an examination and I don't know what the doctor requires of him after he leaves us. We just send him to the doctors for an examination to see if he is physically fit to stand the job he is trying to get.

Q. Does the applicant bring the doctor's form back to you, Mr. Whitten?

A. In some cases he does.

Q. And in other cases, what happens to it?

A. They mail them in; sometimes the doctors mail them in.

Q. After this doctor's statement is received by you, do you speak further to the applicant?

A. How is that?

Q. After you receive this doctor's report, do you speak further to the applicant for the position?

A. Yes.

Q. At that time or at any other time, have you given the applicant prior to undertaking this so-called cubbing, any form of a written permit or authority to be on the premises of the company?

A. Well, we did not give him a written permit, but we did give the crew that he was to cub with oral instructions as to this man when cubbing and also this foreman that he would be working with would give him a card of some description stating that he had cubbed with him on a certain date.

Q. In other words, however, the employee himself has never been furnished with any written permit of one type or another?

A. Not until recently.

Q. And about how recently has the change been made?

A. Well, it has not been so long ago, in the last few months; I don't know just exactly the date of it; it was in the last few months that we have been giving written forms.

Q. Has that been since January 1, 1945, say?

A. I believe it was the latter part of last year, 1944, I believe; I am not positive of the date of it.

Q. You recall I was in your office, Mr. Whitten, about ten days ago?

A. Yes.

Q. At that time you had occasion to check as to the time when these new written permits first began to be used?

A. Yes.

Q. At that time, do you know what was the earliest permit that you were able to produce?

A. Well, I don't remember off-hand; as I told you at the time, there had been several of the boys that had had these permits, that had got lost and were never turned in; they had misplaced them and did not turn them back into the office.

Q. Can you give us any more definite idea as to when the written permit was first put to use?

A. I couldn't say any definite date on it because we didn't make any record of the definite time that we did start to give them the written permit.

Q. Now, at that time that the applicant speaks to you after completing the physical examination, is he given any other books, instructions, or anything?

A. Yes; I take each man and talk with him and tell him what he is going to be up against on the extra board; when he goes to work he will be put on the extra board, and I explain to them thoroughly that part of his work will be at night, part on the first shift, part on the third shift, and if conditions slows up the operations so that we have to reduce our forces, that the youngest men put on the extra board will be the first ones who will have their job cut off, in other words, on the reduction of forces. I explain to them the hardships that we have with weather, that we have to operate twenty-four hours a day and he will have to supply himself with plenty of good rainclothes and be

prepared to take the weather at all times, because we cannot stop the operations due to snow, rain, sleet or sunshine, and I explain to them clearly the conditions that we work under and give them the whole lay-out of the operations and the different jobs that we have, and he will not be on any one particular job at all. He just catches what extra work is open, and we take them in seniority order, first in and first out on the extra board.

Q. At that time, Mr. Whitten, do you tell the applicant, or we will call him a cub, or trainee or employee, whatever the proper term may be, do you tell the fellow when to report for the first day's cubbing?

A. Yes, we tell him to report on the first shift and we leave him instructions with what crew, and introduce him to the crew on the first shift and he will be assigned to an engine number with a certain crew on his first day, and each succeeding day while he is cubbing.

Q. In other words, each succeeding day he is assigned to a different crew?

A. That's right, another engine each time; we rotate them around to another job. We have twenty-one jobs and we try to get them to get acquainted with all the jobs. It is impossible for a new man to get the idea of the whole lay-out while working one job, and our system is, when we get a new man without any experience in railroading at all, he is practically helpless, he is a handicap to the work, and if it wasn't for the older men that we have on the jobs we would have been in a heck of a shape during the last few years with all the war material which we have to handle.

Q. Mr. Whitten, you make these verbal assignments from day to day, if I understand your answer correctly?

A. That's right; we give him instructions when he comes to work in the morning; if I am not there, I leave word with the yard master on duty what job to put him with.

Q. Sometimes, are these assignments to crews made the previous evening?

A. Occasionally they are; part of the time they are when they know that he is—when he leaves in the afternoon when he completes his first tour of duty of cubbing, he will

be told then in the morning to go with engine number so and so.

Q. You say that you have various shifts in the yard; could you call off the shifts and the hours?

A. We have seven shifts, seven jobs, in other words, make it jobs, that goes to work on the first shift; the hours are from six-thirty to two-thirty. We have seven jobs that go to work at two-thirty until ten-thirty P. M. We have seven jobs that go to work from ten-thirty P. M., to six-thirty A. M. the next morning.

Q. When you start a man to cubbing, to which shift do you assign him at first?

A. We always start him on the first shift, and if it is not daylight, if it is in the wintertime and it is not daylight when it is time for him to start cubbing, I tell him to get on the engine and ride with it until daylight and not attempt to do anything at all until it is daylight, until he can see what he is doing, for it is too dangerous.

Q. How long do you keep a cub switchman on the first shift generally?

A. We usually run him on four or five jobs on the first shift.

Q. How many days—

A. It depends on how quick he is to pick up the work.

Q. How many days do you keep him on the first shift?

A. From four to five as the usual thing.

Q. Then to what shift do you transfer him?

A. Then we put him on the second shift, from ten-thirty to two-thirty.

Q. How long do you keep him on that shift?

A. It varies on the ability of the man to pick up the work.

Q. What would be a general average?

A. Around three to four days.

Q. Then what shift, if any?

A. Then we put him on the third shift.

Q. How long do you keep him on the third shift?

A. That is from ten-thirty to six-thirty in the morning. We usually keep him on there three or four days, depending on his ability to pick up the work.

Testimony of John Harrison Whitten

Q. Mr. Whitten, you referred to seven different jobs on the first shift; I wonder if you could explain that a little more; what are those seven jobs?

A. Well, the seven jobs are seven switch engines assigned to different parts of the yard work. The first job we have reference to is what is known as the south end of the yard; number two job would be the north end of the yard; number three job would be in the city yard; number four job would be in Alton Park; number five job would be in the tannery flats; and the other two jobs would be what we call roustabout jobs, they go anywhere and everywhere.

Q. You stated there are seven jobs on the second shift; what jobs are they?

A. They compare to the same thing on each shift. The same engines work right through twenty-four hours a day; there is a little bit of variation in the duties in some of the second shift, but not a great deal.

Q. Which one of these seven jobs do you assign the cub to?

A. We usually put him on the south end of the yard at six-thirty A. M., the first job he works.

Q. And the second job?

A. The north end of the yard.

Q. And the third job you assign him to?

A. The Alton Park job is usually the next job.

Q. And the next job?

A. In the city yard.

Q. And then the next job?

A. In the tannery flats job.

Q. And the last two would be which jobs?

A. The roustabout jobs.

Q. How does the work which is performed on these several different jobs differ?

A. Well, on the south end of the yard, that job is breaking up and making up trains practically the entire tour of duty; that includes all trains on the southbound moves, and on the next job which is called the north end job, that is breaking up and building trains going north. Those two jobs are comparatively the same kind of work with

the exceptions of the track lay-out is different from one yard to the other, and the Alton Park job is all switching industry work, and the tannery flats job is all industry work. In the city yard job, their work includes industry work and switching of passenger trains, freight houses, team tracks; and the other two jobs was what we call roustabout jobs; they are making deliveries from our yard to the connecting lines here, or any odd job that comes up during the hours they are on duty.

Q. Can you state briefly and rather fully at the same time, Mr. Whitten, what physical activities a switchman at Cravens Yard engages in?

A. Well, he has to know the tracks that he is going to; when they come off a train with a cut-off car to switch up, he knows what signals are to be given to go to what track with so many cars, what other cars go to different tracks, classifying the cars that come out of this train, throwing switches, cutting off cars, giving signals to the engineer what move is desired.

Q. How does the physical work which the switchman engages in, differ in these seven different jobs, if any?

A. Well, there is quite a difference in part of the jobs. Now, in the north end job, the job would be practically the same kind of operation as the one on the south end of the yard. When he goes to Alton Park, the territory in that part of the town is very irregular. He has got hills and grades there to go up and down. They have to wind up the brakes in the cars to hold them, to keep them underway on the hills if they leave them. There is very much difference in the work there than there is in the yard. That is spotting cars for the different industries to load and unload and the work is considerably different from the trainyard work.

Q. Does not all this work involve much the same sort of physical activity, I mean switching cars, coupling cars, coupling the air hose, cutting cars, setting handbrakes?

A. Yes, they would have to, of course, naturally throw the switches to get in on the different tracks and they would have to cut off the cars as they leave, but as a rule the difference in the two jobs is, in the yard they would cut the cars off rolling, and in the industries they

would stop. In each case they cut the cars off and come out, throw the switches and get back to their main lead, or, in other words, in the yard, our yard is almost level. If they have got room they start the car rolling about three or four miles an hour and give the man a signal how many cars that he wants him to cut off and he will cut off three or four cars and they will roll on the track in the clear; but on the industry work you cannot kick cars, due to the hazards of tearing up other property around the industries, and on grades where they would not stop, they naturally have to go in and stop the train and separate the air hose and separate the couplers and set up the hand brakes.

Q. What is the purpose of having these fellows cub in all these various different locations that I have mentioned?

A. That is to tell what he is to do when he goes there and to find out where the connections are, find out how to get the different industries and find out the hazards of the work in case he gets to these places at night. A man that hasn't cubbed in these places that goes to them at night would be in an awful bad position; he would be lost and get himself hurt or somebody else hurt. We, therefore, have to insist on him going to these places, tight places and industry work during the daytime so that when he does get on the board he has some idea about where he is going. To take a man that has never been over the territory and put him out there, why he would be in the way. As one foreman told me a while back, he says, "leave him here; I will do the work by myself. He will just be in the way."

Q. Mr. Whitten, how long would it take a switchman, a new man, to learn to throw a switch?

A. It wouldn't take him but a short time to learn how to throw a switch open.

Q. Would you put it in minutes?

A. I would say about two minutes.

Q. How long would it take a new man to learn to couple a car, couple an air hose?

A. It would not take over—; well, now, let me see, that would be a pretty hard proposition to state exactly

how long it would take him to learn that. He could be shown how and let him attempt it, and then he might not do it for several attempts. The knuckles have got to be adjusted on these couplers in attempting to couple cars. If a man doesn't have some knowledge of how they have to be set, why he would probably miss the couplings a number of times before he got the cars coupled.

Q. How long does it take to couple?

Mr. Whitwell: Mr. Cadra, you are not insisting that there is just only one switch in the yard in Chattanooga?

Mr. Cadra: No, Mr. Whitwell, I have no doubt there are many.

Q. Incidentally, how many switches are there in Cravens?

A. I don't know the exact number, but I guess there would be something like two hundred and fifty or three hundred switches, maybe more.

Q. Are they all operated by hand?

A. No, not all of them.

Q. About what number are operated by hand?

A. We have what we call interlocking plants getting in and out of the yard over the main line; they are operated by a leverman in the tower. There would be, let me see, about six switches at each end of the yard that is throwed by the tower man when you come off the main end of the line into the switching unit.

Q. About how many hand-thrown switches are there?

A. There would be in the neighborhood of two hundred and fifty or three hundred; I haven't got an exact count of them.

Q. Does the physical work in the throwing of a switch in one location differ in any way from throwing a switch in another location by hand?

A. The switches are all thrown in the same way.

Q. Getting back to the coupling of the cars, how long would it take a switchman to couple a car and put the air hose together?

A. If he knows what he is doing and adjusts the knuckles right before the car hit, why it doesn't take any time to couple them up at all scarcely. If he has got the knuckles adjusted right before they come in and lock,

all they have to do is roll into them and they will adjust themselves if the knuckles are right.

Q. In other words, it takes less than a minute?

A. That wouldn't take any time at all if they are adjusted right. If you understand, when a car is uncoupled from the other one, why that knuckle opens up and automatically stay open, and when he goes to couple this car into the next one, a number of times that knuckle is set there just right to couple up without any operation at all.

Q. About how many times would a fellow, if he were practicing time after time, I mean continuously, about how many such couplings would he have to make before he got on to the trick of making couplings?

A. That would vary considerably for the conditions are not the same anywhere in the terminal; now, on a curve they have got to be adjusted one way or the other. A curve in one direction and a curve in another direction would have to be adjusted in different ways, and on a hill they would have to be adjusted probably a different way than that, and the curves are not the same degrees of curves, and the place of the coupling varies from straight track to the slack curves, to stiff curves, and it would take a man a considerable time to get it in his head how to adjust these knuckles on the different locations where he is going to make a coupling, and there would be no set rule to state how long it takes a man to make that coupling. I have seen times that they couldn't hardly couple a car on the curve and had to push them off the curve before they could get them coupled.

Q. How about cutting a car; how long would it take a man to learn to cut a car?

A. It would not take long to learn to cut off one car, but if he undertakes to cut off the cars as are directed by his foreman, he would he would have to know what he was doing and what the signals were and how many to cut off, but as far as pulling the lever to cut the cars off, it would not take long to learn that in the different places that he is in.

Q. Do you require all applicants for switchman jobs to undergo this so-called cubbing period?

A. Yes, we would have to, having a man without any experience in our yard or any knowledge about the tracks, he couldn't get anywhere. He would be useless if he was to go out there with a switch engine and the foreman tells him to bring his engine to track No. 10, he wouldn't know where No. 10 was any more than you would know where Hitler is today.

Q. In other words, an applicant may know all the physical work which is involved by himself, but that is not sufficient for your purposes; he has to learn the yard?

A. He has got to learn the tracks and how to get to them, how to get to the cross-overs, how to get to the main line, how to get to the shop, how to get to the repair track, learn how to get to the scale track, learn where the hold tracks are, learn where the classification tracks are, know where the train-head tracks are, and know what switch to throw when he is going to one of these tracks. Now, as far as throwing a switch, anybody could go out there and throw a switch over, but whether he is throwing the right one or not, he has got to know these switches, which switch is which and what track he is going to when he is given a signal to come to a certain track with a car on his engine.

Q. Would you therefore state that the primary purpose of cubbing these applicants is that they may learn the yard, rather than the physical work involved?

A. Well, that would be the biggest part of the duties, is to learn what to do and when. There is more to railroading than the physical work. It wouldn't be so hard to get it if you know what to do at the right time and when to do it.

Q. Have you ever observed these people cubbing, Mr. Whitten?

A. Yes, I watch them practically all the time when I get a chance; I watch their actions to see what actions they are taking, and I instruct them right on the safe way to do certain jobs and the safe conditions they can get themselves in.

Q. How do these so-called cubs spend their cubbing day?

A. Well, they usually get with the foreman that—the

crew that we assign them with. What we call a crew is a foreman and two helpers. The foreman has charge of the engine car and we put this man with what we call the footboard man on this engine. Now, we have the foreman and what we call a field man, and a footboard man. Now, there is also a difference in the jobs there; the field man goes down in the yard and lines up the switches; he knows where the cars are going; he has got to check these cars and know where they are going to. He goes off maybe a half a mile from this engine, lining switches up with different tracks where he wants this to be switched. The footboard man stays with the engine, or close to the engine, and when they pull up over a switch to switch up different cut cars, the foreman is standing between the two men; he will give this footboard man a signal how many cars he wants cut off, and he will cut one, two, three cars, whatever he wants to cut off, to go to a certain track, and he will give a signal if there is anyone there, to keep it set until those cars roll in the clear and the foreman will give him a signal if there is anyone there, to be sure and cut off as many cars as he wants to go to the next track.

Well, now then when they put these cubs out with this man, we tell him to watch what they are doing, stand out there if necessary and watch what they are doing, not to attempt to do anything, see what the operation looks like, get on the engine and ride, speak with them and throw that switch and come back to the train, see if he can couple it up. The footboard man rides with him all the time; he will stand on the footboard with him and show him how they have to be coupled, what position he has got a drawhead in to make the coupling. Then he will show this man what a back-up signal means. The engine will back up with this cut-off car; the regular man knows where he is going; he gets up to switch the number to the other track where he swings off, and the engine pulls these cars over the switch; he will give the engineer a signal to stop. He will throw the switch and the foreman will again proceed to give him signals on how many cars he wants cut off and the man in the field is clearing tracks for the cars to go to. Now, he takes

this cub with him and takes him along and lets him ride on this engine and shows him what there is to do, and shows him and tells him what the signals mean, but he won't let him give signals until he is out there for some time, as he could give possibly give wrong signals and get somebody hurt. He will eventually tell this boy, "Now you throw that switch when we get over it".

Q. Do they let cubs throw switches the first day?

A. Yes, if they are in position that they can. Now, if they have got a little spare time and it won't interfere with their work, they will show him and tell him to throw that switch. They will stop and tell him to throw that switch. Most of them have got a little latch; you raise the latch up and throw the switch over.

Q. They let him couple and uncouple cars the first day he is cubbing?

A. Yes, they let him cut off some cars, but being easy with him. They will let him pull the levers, telling him which lever to pull, how to stand and how to run alongside of the car if the car is in motion, and show him how to stand.

Q. Do these so-called cubs cub a full shift generally?

A. Yes, they usually cub a full shift.

Q. They do that always, do they not?

A. Yes, they are supposed to cub out their full shift.

Q. Sometimes they will cub two shifts a day, will they not?

A. Well, they may cub over on another shift for four and one-half hours, or something like that, twelve and one-half hours a day, as like most of them say, the sooner I can get through. At their request lots of times we let them double over to what we call the second shift for four and one-half hours.

Q. Mr. Whitten, do you ever use a cub to do the work of a regular switchman while he is still cubbing?

A. I believe we have in one case that I recall, that our men laid out sick and we couldn't get the work done, and we had a man cubbing that had been there for, I believe, four or five days and we had to put him in service on one occasion; that is the only one that I recall.

Q. May there have been other occasions?

A. I don't recall of any other occasion, only one that I recall.

Q. Did he continue to cub after having worked as a regular switchman during that one day?

A. Yes, he cubbed on for a few days longer, and I believe it was at his request, that he didn't feel like he was capable of taking his part until he had a little more experience.

Q. To what man are you referring now, Mr. Whitten?

A. I don't remember his name; I don't remember what his name was.

Q. Is he still employed by the N. C. & St. L.?

A. I would have to look at the records; I forgot what his name was; I don't know whether he is or not.

Q. How long does it generally take a switchman to complete his cubbing period?

A. It depends on the man; some of them will never learn the work and some of them pick it up in six or eight days, some of them ten or twelve days, and some of them just come in and say that they can't learn the work and quit and walk off.

Q. Have you ever let anybody go because seemingly he could not qualify for the switchman job?

A. No, they just quit on their own account; they couldn't learn the work and don't like it, and walk off.

Q. Well, how long would you keep a man down there cubbing if he wanted to, when it appeared to you that he was not qualified?

A. Well, we usually—; how is that now?

Q. How long would you keep a man cubbing after you thought that he would not be able to meet your qualifications?

A. Well, if I saw that he wasn't going to make it at all, I would ask him about it and ask him if he thought he was going to learn the job, but I don't recall ever taking one off and telling him he wasn't going to learn. We give them all the chance in the world to learn the job, too much. There has been a lot of cases, they just come in voluntarily and tell us, "I don't believe I am going to like this work; I don't believe I am going to be able to learn this job," and they are gone.

Q. Do these cub switchmen have any papers which are required to be signed by the foreman or any members of the train crews?

A. Yes, we have a form that we give them, a printed form that we are furnishing them now, and previous to this printed form, we had the foreman to either verbally, or give him a card stating that he cubbed with him.

Q. Now, this printed form you are referring to, that is the same form which you stated previously had been put in effect only recently, I forget just how far back you said.

A. Yes, that's right.

Q. Prior thereto, were the cubs required to obtain any signatures?

A. Yes, we required the foreman to okay him by his signature.

Q. Do you have any such forms in your office?

A. I don't believe that we have; I don't know whether we have got any of them left or not. Usually we have a whole lot of little cards about that long and about so wide, whenever you cub a man, his name is on that card and you give it to him and he brings it in and lays it down, and I don't know whether they have all been taken care of, or whether any of them have been taken care of or not.

Q. Well, as a matter of fact, isn't it so, Mr. Whitten, that you would decide whether to put a man on the extra board simply by speaking to the foreman without having the cub or anyone else give you any written statement?

A. Well, not necessarily, they would practically all get these cards or a piece of paper with the foreman's name on it and then on top of that, I would personally ask the foreman if he thought this man knew enough about it to take a man's part before we put him to work, and if he told me no, why I would let him cub some more until he would be qualified to handle the job when he was put on it.

Q. Are the cubs prior to being put on the extra board required to pass any written examination?

A. Not necessarily, no.

Q. What do you mean, not necessarily, no.

A. Well, we have our past practice in our yards that we can work these men and then get a class when we get a number of them coming up and have them all attend at the same time, that is on operating rules, but now then on the yard rules and our simple rules around there and doing the work, the foreman they are working with teaches it to them and he asks them when he gets through, he asks them, "Now, do you know these signals and these rules around the yard here?" I will ask them what they think about themselves handling their jobs before we let them go to work, but as far as the general writing of the rules, we just hold class usually about once a year and get all the new employees in on that one examination.

Q. In other words, prior to being put on the extra board, generally a cub does not have to pass any written or oral examination?

A. Well,—I would say the written—now, we do orally ask them questions about the rules, I do myself, and the men they are working with will. For instance, a foreman —now, I might state in there that they are all old men on this first shift, that practically every man there down there that is running a crew has been in there for a number of years and of course they know the rules from A to Z and they teach these boys the rules as they go along of all the operations necessary in the yard and of course our main line rules would not all have a bearing on a yard crew; there is some rules that he knows, the main line rules, but there isn't as much of it as there is in the general rules. The yard man is not required to keep up with all the rules that the main-line men are. There are just certain rules in the yard that they have got to familiarize themselves with.

Q. If you are in great need of switchmen, as you are at times, you will cut down the cubbing length that a fellow has to cub, will you not?

A. Well, if we think that he can get by with the job and we have cubbed men now a very short space of time, but these men have had experience in switching in other yards; when a man gets the principles of switching, all in the world he has got to learn is the yard that he is in, how to get to the different places and as far as learning

the switching is concerned, he knows the switching end of it, but it is the lay-out that he does not know. We can put a man on a job like that where he knows the principles of switching and we can let him go over the terminals and in two or three days put him to work, for he knows the principles of switching, he knows the rules, he knows what has to be done, but all he doesn't know is the lay-out of the yards.

Q. As a matter of fact, these experienced switchmen come from other yards or roads and they cub seven or eight days, do they not, generally?

A. How is that now?

Q. They cub generally about seven or eight days?

A. No, not in all cases; I just stated that if we had an experienced man there in some other yard and we put him on there, we possibly would not cub him but two or three or four days if we was in bad shape for men, but if we had plenty of men at the time and his services were not needed right off the bat, why we would let him cub three or four, five or six days or seven days, depending on the circumstances at the time he was doing his cubbing.

Q. Prior to December 1, 1943, were these cubs paid any compensation for the time spent in cubbing?

A. I don't think so.

Q. Have they been paid anything since that time?

A. Well, they have been given five dollars a day to try to get them to work.

Q. If they did not complete their cubbing, were they paid the five dollars that you know of?

A. I couldn't say whether they were paid that or not.

Q. When you employed them did you tell them anything about whether or not they would be paid five dollars while cubbing?

A. Yes, we tell them it now, "We give you five dollars a day while you are cubbing the job if you stay with it, but if you don't stay with it, you will not be given five dollars a day for your time here."

Q. Have you received any other instructions very recently?

A. No, not recently.

Q. If a man applied to you today, you would advise him that he would be paid five dollars a day for cubbing, but if he did not complete his cubbing he would not be paid any compensation whatsoever, is that correct?

A. Yes, I would tell him that is what we do, the deal we make with him. We try to get him to stay on the job when we put him on there; there is so many of them that come in and cub a day or two and we never see them the next morning. We try to induce them to stay with it when we put them on and try to get them on.

Q. Now, you stated that prior to December 1, 1943, the cubs were not paid any compensation whatsoever; what is the reason for paying the cubs the five dollars at this time?

A. Well, we could not get men; the army began to take our men out and we could not get them to come down there and cub a job for nothing. Most of the men we had to go to hiring were the older men and practically all the older men have got families and they couldn't agree to come down there and cub on the job for days without something; they could get jobs other places.

Q. In other words, is this payment being made because of the present war emergency?

A. Well, I should say it is that we can't get men to work; we induce them to come down and take the job; we give them five dollars a day to help them along until they do get the work.

Q. Prior to December 1, 1943, do you have any records that you know of, Mr. Whitten, which would show the number of days that the cubs cubbed prior to being placed on the extra board?

A. No, I don't believe we have got complete records on that for the simple fact that we have been up against it so tight for clerical help as well as supervisory forces, that our records have not been kept up to date.

Q. I see you have here a large book; what do you call this book, Mr. Whitten?

A. Well, I suppose you would call that the record of the employees.

Q. Mr. Whitten, could you locate the name of Mr. James D. Nave in this book and state what the book

shows as to the number of hours or days that Mr. Nave cubbed.

A. This record does not show how many days he cubbed.

Q. What does it show in reference to any matter which might be pertinent in determining the number of days he cubbed?

A. It just shows the time that he was added to the extra board, which was January 23, 1943.

Q. Does it show the date when he first applied for work or passed the initial physical examination?

A. He passed the physical examination December 29, 1942.

Q. Do you have any other records which would show either the hours or days which persons have spent cubbing prior to say, December 1, 1943?

A. Not that I recall.

Q. Is that a fairly typical entry in the sole records you have kept on the cubs prior to December 1, 1943?

A. Well, as I stated before, that our clerical help was turning so fast that it was impossible to keep all the records as they should be; they were not kept up to date due to the shortage of help.

Q. Mr. Whitten, do you happen to know whether at this time the N. C. & St. L. is deducting railroad retirement from these five dollars a day payments?

A. No, I don't know whether they are or not.

Q. Since December 1, 1943, what records if any have you kept on the time which these people have spent cubbing?

A. Well, we have tried to keep them up in better order since that time and I think that most of them are pretty well up to date since the first of 1944.

Q. Referring to the book again, will that show the number of hours which an employee spent cubbing or will it merely show the number of days which an employee spent cubbing?

A. That is since 1944 you have reference to?

Q. Yes, since you started making the five dollar payment.

A. Well, their time ticket goes in, the foreman that he works with makes out a time ticket and sends it in and it

might be that he didn't have a complete record on each day that he would cub, for each foreman is supposed to make out a time ticket for his crew daily and send it to the auditors at Nashville.

Q. Do they send it directly, or through you?

A. Through our office; it comes through our office.

Q. You do not have any records here then of the hours which cubs have spent cubbing?

A. On most occasions we have; I say it could be possible that we might have missed some of it; we try to keep a record on all the hours that they would work. There is a possibility there of some of them being missed.

Q. Suppose that a person cubs two shifts in one day; would he be paid ten dollars or only five dollars?

A. We haven't let any of them cub two shifts that I know of; we have let them cub a shift and a half.

Q. Has that been only recently, since January 1, 1945?

A. It has just been a few occasions of this when they asked to get on the board as quick as possible and we let them work twelve and a half hours if they wanted to. That is optional with them.

Q. That is recently, since January 1, 1945, or do you mean to state that since this five dollar payment was inaugurated you let them cub not more than twelve and one-half hours?

A. That's right.

Q. What is your answer?

A. Yes, in a few cases they have asked permission to cub a little longer to learn their job quicker and we have let them cub as much as twelve and one-half hours.

Q. Have you since December 1, 1943 and December 1, 1944, allowed any persons to cub two full shifts in a day; I am not talking about what may have happened recently.

A. Not that I know of.

Q. If a cub spends twelve and one-half hours cubbing in any one day, is he paid more than the five dollars per day?

A. I don't know what the pay would be; the time tickets were turned in and I don't know what they pay him. The foreman, if he works eight hours with one man, he will

turn in a ticket for eight hours, and the next man will turn in a time ticket covering four and one-half hours, and I don't know what the pay is.

Q. Do you have the same system of paying the firemen if they complete their cubbing as when they fail to complete their cubbing?

A. I don't know what the ruling is with firemen; I have nothing to do with firemen; it is the engineer—

Q. Under whose jurisdiction—

A. It is under the master mechanic's.

Q. And what is his name?

A. C. C. Burton.

Q. Do they cub firemen, that you know?

A. I couldn't say.

Q. At Cravens Yard?

A. I couldn't say whether they do or not; I have nothing whatsoever to do with the mechanical department.

Q. You state that the train crew consists of a foreman, two switchmen, an engineer and what other employee?

A. Fireman.

Q. When persons are cubbing, under whose immediate jurisdiction are they cubbing?

A. The fireman and engineer are under the mechanical department.

Q. Speaking of switchmen.

A. Switchmen are under my department.

Q. And under whose jurisdiction would a cub therefore be while cubbing?

A. He would be under my jurisdiction, a switchman would.

Q. You would give him instructions as to what to do or what not to do?

A. The switchman you have reference to?

Q. Yes.

A. Well, I would take them to the crew and tell them that he was cubbing with them, and to give him all the information they could and show him all they could about the operations of the yard.

Q. Well, who on the crew, if anyone, tells him what to do?

A. The footboard man as I stated before, he would be placed with the footboard man with this crew and he would go with him practically the full time that he was with this crew and he would tell him the operation, what moves that he was going to make, tell him what they were going to do and how to do it and what the signals mean and what the targets all meant.

Q. Would he also tell him what switches to throw?

A. Yes, he would have to show him and tell him too, because he wouldn't know the number of the track; he would have to show him what switches to throw.

Q. He would tell him what cars to couple?

A. He would tell him what cars to uncouple; if they were going to couple up the cars, he could see the ones they were going to couple up; he wouldn't have to tell him that.

Mr. Cadra: That is all.

Mr. Whitwell: Let us adjourn until one o'clock.

(Luncheon recess.)

(At one o'clock by mutual agreement it was postponed until 9:00 A. M., May 9th.)

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Whitten, what position do you hold with the N. C. & St. L. Railway?

A. General yard master.

Q. You are located in Chattanooga?

A. In Chattanooga.

Q. How long have you been general yard master?

A. I have been general yard master thirteen years.

Q. Do you as general yard master have jurisdiction over receiving applications for positions as switchmen?

A. I do.

Q. In the Chattanooga yard?

A. I do.

Q. Now, where a person makes an application for a posi-

tion as switchman, I take it that that is the first step he takes, isn't it?

A. Yes.

Q. He makes out and fills out a written application?

A. Yes.

Q. Now, when he fills out this application for the position of switchman, is it explained to him at the time he fills out the application that he is not at that time employed and that he has to go through a training period?

A. Yes, he is given to understand that we have to get his reference from his former employers as to his ability, his character and so on, and then it is explained to him that he will have to cub until he learns the work and it depends on him how soon he can get on the board, what we call our extra board.

Q. And by virtue of this application that he files, that carries with it no obligation of the company to hire him and it carries no obligation for him to accept employment, does it?

A. Not a bit in the world.

Q. Now, he goes through this pre-employment training period and sometime later he must pass an examination?

A. That's right.

Mr. Cadra: Mr. Whitwell, since Mr. Whitten is a company employee, I believe that we could get the information more accurately if the questions were not too leading.

Mr. Whitwell: Well, he is on cross-examination and you can ask leading questions on cross-examination.

Mr. Cadra: However, he is a company employee and as such an adverse witness.

Q. Mr. Whitten, prior to December 1, 1943, were cubs paid anything during their cubbing period?

A. Not that I know of.

Q. Now, beginning about December 1, 1943, is it or not true that the N. C. & St. L. inaugurated a plan of paying cub switchmen and cub firemen during their cubbing period five dollars a day as an incentive payment?

A. That's right; we couldn't get the men; they wouldn't work out the cubbing out period.

Q. Was that five dollars intended as wages or was it just a gift?

A. To get them to learn the job, an incentive to take on the job and try to learn it.

Q. And where a switchman cubbed in the yard here at Chattanooga, whether he cubbed six hours a day or ten hours a day he got the same compensation, that is the same five dollars, didn't he?

A. Yes, we allowed him five dollars regardless of his hours.

Q. Now, he received no contractual wage rate until after he had completed his cubbing and went on the roster of employees, is that right?

A. I didn't get that.

Mr. Cadra: I object to the form of the question.

The Witness: I didn't get that exactly right.

Q. I say, the cub doesn't receive any contractual wage rate until after he has completed his training period and goes on the roster of employees.

A. That's right, and after he completes his cubbing out and is considered capable of handling the job he has applied for, he is put on the full rate paid by the job.

Q. And when he does enter upon the roster of employees, he receives as I understand it the same contractual wage rate as regular employees who have been with the company a good many years.

A. That's right, he gets the standard rate; I believe it is $8.54 a day, right about there; that would be the same amount that men who have been there for thirty and forty years get.

Q. Does one of these cub switchmen, or cub for the position, does he have any status at all as an employee until after he has completed his training period and entered upon the roster of employees?

Mr. Cadra: I object to the form of the question.

Mr. Whitwell: You may answer.

The Witness; No, he is not considered an employee until we put him on the roster; he has no status at all, just learn-

ing, and if he learns the job all right and can contend with it, why he is put on the roster and his seniority starts from the day that we put him on the roster.

Q. Does his status while cubbing, is it covered by any labor agreement?

A. None that I know of.

Q. Is the railway obligated in any way to employ a cub, or is the cub under any obligation to accept employment?

A. Not that I know of.

Q. State whether or not the applicant's attendance as a cub is purely voluntary on his part.

A. Yes, they ask for permission to learn the job.

Q. When a trainee files his application, is he at that time advised that he will not receive any contractual wage until after he has completed his training period and entered upon the roster of employees?

A. He is; he is told when he is put on the roster that he will receive the full benefit of the salary that the job pays.

Q. Is it the practice of the N. C. & St. L., and also the railroads generally throughout the country, to require applicants to undergo a training period to learn the duties and activities of the position which they seek?

A. It would have to be for there is no new man that can come into any one yard that is not familiar with it and carry on the duties. It would be an impossibility.

Q. Is there any school where a person could attend and learn the duties of a switchman or fireman in the yards, or does he have to become actually acquainted with the physical lay-out of the yards?

A. Well, there is no school here close to Chattanooga that I know of, and even if he did attend a school, as I see it the schooling could not tell him the conditions that he would get up against in the different yards all over the United States. It would be absolutely necessary for him to get some idea and see the conditions where he was having to work before he would be capable of carrying on the duties at all.

Q. In other words, if I understand you correctly, even if there were a school, still the cub would have to learn the road and the switches and the signals and the prac-

tices of the company by actual training in the yards, wouldn't he?

A. He would have to have; he would be compelled to have some training in the yard regardless of his schooling.

Q. Mr. Whitten, give us some idea of the extent of the yards here in Chattanooga where cub switchmen or applicants are trained to become employees later, the extent of your yards.

A. Well, our yard limits extend from the far south of Alton Park, and the foot of Lookout Mountain, through the main part of the city and out to what is known as the Mellon Chair Company switch, which is on the south side of the town, and there is numerous switches and sidetracks all along every so often, and in this entire territory a man has to know where he is going and how he would get to these places, what route to take, what to look out for, the crossings that he has to contend with and the location numbers that the different industries go under. We do not designate an industry as its name; they are all numbers. Each industry has a number. He has to know the number of each industry and in what district they are located. We have the yards divided up into six districts and all industries that are in District No. 1 are numbered beginning with one hundred; all industries in District No. 2 begin with the numeral two hundred and so on up with all the districts and each industry has a location number and the cars are marked to location number and not to consignee. Well, if he did not know these location numbers, he would be lost in trying to get a car to a man's door, if he is not familiar with the location numbers and the district in which they went to. When a train arrives in the Cravens Yard, he may have twenty-five to thirty-five cars for Chattanooga industries. Our clerks will mark those cars before they are switched to the location that they are to go to and the foreman and his two helpers take a check of the train, switch these cars to each track that goes to the district that they are to go to. That is what we call classifying the cars of different districts, and if he did not know something about what track they classified the different districts on, he would be lost completely.

Q. Do you have some idea, Mr. Whitten, about approximately the number of cars that are switched here in the Chattanooga yard on any given day on an average?

A. We are averaging right now and have been for some time between twenty-five hundred and three thousand cars every twenty-four hours. That is going, coming and switching through the yards and industries in and out, delivering to connection and all, averaging about between twenty-five hundred and three thousand cars per day in switch moves.

Q. An applicant for a position as a switchman or fireman in the yards at Chattanooga, is it necessary that he become familiar with all these districts that you spoke of?

A. Yes, for he would be an extra man, he would be subject to work on any of these jobs at any time, day or night.

Q. Is it necessary that an applicant for a position as switchman or fireman must study the operating rules of the company and acquaint himself with the operating signals and fixed objects in the yards?

A. It is; he is given a rule book, a timetable and a signal book that he is instructed to study to learn the different signals and the general operations that he will be confronted with when he is put on the job.

Q. Is it necessary that he go through this training period for his own protection and the safety of himself and of the public and the safety of operations in the yard?

A. It is absolutely necessary; if he was turned loose—now, just for example, suppose we put three new men on an engine down there to operate that engine crew at night. There is one switch lead, there is nine switches in a row. At night they display a green signal on one side and a yellow signal on the other side, and should he come out there tonight and look down and see that row of green signals down there, he wouldn't have no idea in the world what they meant, what track they were lined up for, or whether he would run into somebody else or run through a switch and derail cars or sideswipe cars with other cars that he had hold of.

Q. I believe you estimated yesterday that there were approximately two hundred and fifty different switches in the Chattanooga yard.

A. Yes, and I run through my mind with them last night and I counted a little better than three hundred. Now, that is not accurate, but from running through the switches that I could recall, from one end of the yard to the other, there is a little better than three hundred switches.

Q. Mr. Whitten, I believe you said yesterday that this training period depends on the aptitude and the ability and the prior experience and the industry of the trainee himself, that there is no set period for training.

A. That is right, there is some men in that business that just like in any other business, that we have men that will pick up the work and learn it right off the bat, and they seem to be naturally born for a railroad man, and we have others that will cub on the job for days and can't seem to get it into their heads what is to be done. The biggest trouble we have with them is the signals; we have right in the Cravens Yard thirty-six tracks, each track is numbered and the crews in switching are not close enough together to tell the other one what he wants done. He automatically gives him a signal to where to come to and if a man didn't know the signals of all these thirty-six different tracks in the yard, he would be absolutely lost and would be useless and in the way until he learns the different signals for the different tracks. The whole operation is practically signals; as far as throwing the switch or uncoupling the cars, there is nothing to that only a little manual labor, but the main part of the whole operation is learning the signals and each track has a different signal and the foreman will give a signal back to the man that is near the engine and he is supposed to repeat that signal to the engineer of what track they want to come to, or what move they want to make. The engineer works strictly by signals and that is the main thing of the whole operation is the signal work. As I have stated, they are not close enough to tell one another what they want to do; with the noise and all it would be impossible to tell them. They have got to give signals and that is the main trouble of the new man is learning signals.

Q. Now, I believe you said that some of these trainees

qualified sooner than others and is it also true that some never qualify?

A. We have had several that cubbed for several days and volunteered and come in and told me that they didn't believe they would ever learn the work and give it up and not attempt to go any further with it. I know some years ago in particular we had a young man come down there; we have been trying to get ones that have been discharged out of the army and the navy as far as we can, and I had a great big strapping boy come down, twenty-two years old, and I thought if we ever would get hold of the makings of a good man in railroading that he would be it. He cubbed around there for a few days and come to me; he come to me and said, "I can't get it in my head, these signals, to save my life," and he said, "There is no use my going on there," and he quit and that is all. And we have had a number that would do the same thing. They would work a few days and quit and say they didn't like the work.

Q. Now, one of these trainees, does he train in the yards, whether he is an applicant for the position of switchman or fireman, does he train with a full switching crew?

A. Yes, we have a foreman and two helpers with every crew. We put this trainee with an old experienced crew to start with; it would be bad to put him out with another new man to try to train him, and we fix him with an older man to start with in all cases, for his own safety as well as the men they are working with, and the safety of the equipment. We have had several cases of these men that throw the wrong switch and cause cars to derail or run into cars on another track, and therefore we keep as close watch on them as we can with the older men and with the best we do, we still have some accidents with them by their not knowing just exactly what to do at the right time.

Q. Do you cub more than one trainee with any given crew at the same time?

A. No, he would be in the way; one is bad enough with a crew. It slows the work down with them, and if we do put two on at the same time, we put one with one engine

and one with the other engine on the daylight shift and we tell them at the time that we do not want them working on either job after dark, in any case until they get the lay of the land and the operations that is to be made in their head so that they will not get run over or get hurt; it is a very dangerous movement with a new man. We have at times five switch engines working in the yard at one time on adjoining tracks and numerous road engines going and coming and at the very best we can do, it is dangerous with a man that is knowing what he is doing, and disregarding a man that don't know what is is doing, he is in a powerful dangerous place, and we are doing our best to keep any of them from getting hurt.

Q. Does this trainee perform any actual manual activities that the regular employee would not perform in the regular course of his employment?

A. No, he would not do any manual labor; in fact, he would not do as much as the regular employee. He would be allowed to help and this man would instruct him and let him do part of it, and he would do part of it, and he would have to be with him all the time; he would have to be close to him to advise him on every move because no two moves would be exactly alike.

Q. In other words, whatever the trainee does in the course of his training is to learn the duties of the job that he has applied for; whatever he does along those lines is something that the regular employee is paid to do, is that right?

A. That's right; he is doing just what this regular paid employee instructs him and he is instructed how it has to be done, and to get him acquainted with it he will let him do part of it, gradually coming up to doing it and learning the signals and whenever he is with this regular employee and the foreman down away from him maybe four or five hundred feet from him gives a signal and he tells him to watch that foreman and see what kind of signal he gives, and he will ask him, "Do you see that signal," and he says, "Yes"; after, he says, "Do you know what it means," and he says, "No, I don't know what it means." He will explain to him that he is giving a back-

up signal or a come-up signal, or a cut-off signal, or a track number to go to, and he will explain these signals and get him to watch these signals all the time so that he can get it in his head to know what they mean when he sees one.

Q. State whether or not this applicant or trainee trains under the supervision of the crew or some member of the crew who is paid to do the work.

A. He is put with the regular crew, the regular paid crews and as I have stated, he is put with the man that we call the footboard man on this crew and he starts his training on that end of the job because it is the easiest job on that crew, and gradually picks up the work.

Q. Does this trainee while training have any duty or any responsibility in connection with any movements in the yard?

A. None whatsoever; we don't hold him responsible for anything while he is training.

Q. Does he represent an additional man over and above the normal complement of a regular crew in the yard?

A. He does not.

Q. I say, does he represent an additional man, that is an extra man over and above the regular full crew.

A. No, not as a paid man; he is a trainee with this regular paid crew, but he does not constitute a fourth man with the crew.

Q. Does the railway receive any productive work from his training while he is cubbing?

A. None whatsoever; in other words, he slows up the work with the crew that he is on and the crews would rather not have him, but as I tell them, "You were all new when you come in; you had to be taught how to do this work; we have got to have new ones and it is up to you boys to do this work, to take this man and struggle on with him and do the best you can with him until he learns the duties of the job."

Q. In other words, if I understand you correctly, it is your observation that this trainee is actually a handicap during the period while he is training?

Mr. Cadra: I object to the form of the question.

The Witness: He is a handicap to the crew that he is on; they have got to watch for him and his safety and the safety of the operation and the road and the crew and the switches he is liable to throw wrong if they are not watching right close to him all the time.

Q. Does the railway receive any benefit from this trainee until after he has completed his cubbing and entered upon the regular duties as an employee?

A. Not a bit in the world; he is no help as far as getting the work done; he is no additional help to the crew that he is with.

Q. Now, a trainee training to become a switchman or training to become a fireman in the yard, does he have any definite period within which to train; what I mean by that is, suppose he trains today with a crew in the yard and then lays off two or three days.

A. That is at his option. Now, we have had several cases of that; we would put them to cubbing and on two or three occasions, I don't remember the names of the ones, but they would call and say, "Would it be all right for me not to come in in the morning," and I would tell them it was entirely all right to come whenever he wanted to; it was up to him to come whenever he felt like, and if the weather was bad, a rainy day, which is bad on the regular men and maybe he didn't have a raincoat, he would call and ask would it be an inconvenience for him not to come and I would tell him, "No, if you don't feel like coming in, come in tomorrow, and if you don't want to do that, come when you want to." There is nothing compulsory about cubbing their job out; it is up to them; they can do it as they see fit to cub on the job.

Q. And he is his own judge about when he will train?

A. That's right.

Q. One of these applicants or trainees, is he subject to any of the rules of the company that are applicable to regular employees?

A. None whatsoever; we don't hold him responsible for anything. He is not subject to discipline in any way.

Q. Do you know whether or not he has any status under

the National Railway Labor Act during this period while he is training?

Mr. Cadra: I object to that question.

The Witness: None that I know of.

Q. Is he furnished a permit to cub or oral authority to enter upon the engine or cars of the company for the purpose of this training?

A. Yes, he is furnished written or oral instructions through the crew that he is to be cubbing with.

Q. Is a trainee either for a position as switchman or fireman in the yards required to follow any definite schedule?

A. No, he has no definite schedule to follow at all. Now, that is as far as the switchman end of it is concerned. Now, you are asking about the fireman; when the fireman, of course, comes out from the shops for work, our end of it does not know whether he is an experienced man or not, and the mechanical department handles these cub firemen. Now, I am not familiar with their operations or how they start their cub firemen, but I am speaking for the switching end of it, and not as an authority on the fireman's duties.

Q. Well, so far as trainees for the position of switchmen are concerned, does your company require that such parties train any longer than is actually necessary to learn the lay-out of the yards and the duties of the position which he has applied for?

A. No, he is not required to work any longer than necessary to learn the principles of the job that he is to accept.

Q. Is this training period so far as the company is concerned entered into in good faith with the applicant?

Mr. Cadra: I object to that question.

The Witness: It always is.

Q. State whether or not this training period of the applicant is for the benefit of the applicant himself and to enable him to earn a substantial amount of money after completing his training period?

Mr. Cadra: Object to the form.

The Witness: It is for his own benefit, to learn the different operations and how to take care of himself and not get hurt and not tear up cars or derail trains or cars, and is more for his benefit as far as his personal self is concerned, than anyone else, although we do everything possible to show him the right way and the safe way to do all of his duties.

Q. If such an applicant never qualifies and never goes on the seniority roster, does the railway in such case ever receive any benefit from his cubbing?

A. Not a bit in the world.

Q. Does the railway permit more applicants to cub than it is reasonably anticipated that they might obtain employment for in the immediate future following their training period?

A. No, we have gone to considerable expense on the company to keep from putting a man on when we thought that there was any possibility of his not getting to stay on the job after we got him trained up for it. In the last several weeks we have had to double men at time and a half for the second shift due to not having enough of extra men on the board at the particular time, and knowing the conditions that were likely to take place we refrained from putting on extra men; to do that, they would have to be cut off as soon as some of the injured and sick come back to work. It has been my policy not to hire a man unless I have an awful good idea that he will get to stay with us after we get him trained up.

Q. Now, after December 1, 1943, were all these applicants for a position at a later date as switchmen advised at the time they made their applications that this five dollars was not wages, but was an incentive payment, or more or less expense money?

Mr. Cadra: I object to the form of the question.

The Witness: We told them we would give them five dollars a day to learn the job, and after they had completed their cubbing of the job, we put them on the full rate of pay that the job paid.

Q. Does the general yard master or any other super-

visory official of the railway exercise any jurisdiction, supervision or control over one of these trainees while he is training?

A. Well, all of the yard masters and foremen try to show him and tell him the right and wrong way to take care of a job, and how to do the job in the safe way and how to take care of the equipment by not kicking cars too hard or cutting off cars while they are rolling too fast and staying in the clear of the tracks, and when climbing on top of the car to stand in the middle and to be as safe as possible in learning their work.

Q. In other words, while he is training, he is under the observation of the regular switching crew, is that right?

Mr. Cadra: I object to the form of the question.

The Witness: That's right.

Q. Something was said, I believe, by you yesterday in reference to the fact that sometimes a cub is put to work in an emergency, for example, where a regular employee is taken sick or something; did you make some statement about that?

A. Yes, we had one case; it was the only one that I recall. I believe that sometime last fall someone got sick or hurt, I don't remember the circumstances exactly and we had a man that had been cubbing some four or five days and to keep from tying this crew up, we put him on with this crew to man it that day.

Q. Well, during that period when he was put on with the regular crew, was he paid merely five dollars for that day, or was he paid the regular contractual rate for the position?

A. He was paid the regular scheduled rate.

Q. Is that substantially more than this five dollar incentive payment?

Mr. Cadra: Object to the form of the question.

The Witness: The regular job pays $8.54, I believe it is today, $8.54 and a fraction possibly.

Q. Mr. Whitten, do you have any connection with what we call posting; that is, fellows applying for positions

here in Chattanooga as callers and porters and stenographers and clerks and things like that?

A. No, Mr. Born handles the clerical end of it; as to the need of him being chief clerk, he is better qualified, I have always thought, to pick the clerical help as they are directly under his supervision.

Mr. Whitwell: I believe that is all.

Redirect Examination,

By Mr. Cadra:

Q. Mr. Whitten, you said that there are no schools close to Chattanooga where switchmen might be trained; do you know whether there are schools in the country, say in Memphis, or say the Illinois Central, or any other schools which are available to persons for such training?

A. No, none in the south that I know of; I have heard that there is some road in the north that has a school, but I don't know what road it is. I don't know the name of it, the railroad that operates a school to train their employees beforehand, but I don't remember the road; I am not aware of the fact if there is any in the south.

Q. You spoke about signals, about how many different kinds of signals does a person have to learn?

A. Well, there is numerous signals; on the track signals alone there is thirty-six signals just for track signals alone that he would have to familiarize himself with and other signals he would have to learn, the signals of all the targets and what we call the switch targets; he has to know the position of those targets, what those signals mean, and when an engine blows a whistle he has got to know what that signal means. When a train passes, he has got to know what the signals on that train mean; there are numerous signals that he has got to familiarize himself with.

Q. Are signals used throughout the railroad industry uniform, or are your signals peculiar to the Cravens Yard or the N. C. & St. L. system?

A. As a rule, the boys that works in their own yards make their signals for their different tracks. The Southern Railroad yard and our yard, their signals do not cor-

respond with ours in all cases. Some of their signals do correspond with ours, but most of them, or their track signals, do not, but as far as target signals there is almost uniform colors of red, yellow and green.

Q. What is meant by a target signal?

A. The target, that is the way a switch target, if a switch has got what we call a target on it, in the daytime it is yellow on one side and green on the other, and at night there is a light on there, yellow and green, or red, whichever way conditions stand.

Q. Do you give any class-room instructions on these signals, Mr. Whitten?

A. When they take a general examination they take the whole operating rules, but they learn the signals by being out there among them and the men that they work with show them these signals and show them what they indicate.

Q. Would it not expedite these persons learning the signals if you took them into a class room or gave them one day of instruction on signals; wouldn't they pick it up faster than having to pick it up day by day while out in the yards?

A. As a usual thing I take these men out before I put them to cubbing; I take them out in the yard and show them these signals, show them what their meanings are and which is the stop signal, which is the caution signal, and which is the go-ahead signal, before they attempt to go to cubbing and give them as much instruction on it as we possibly can, but I have always found that they pick the signals up better when they are out working with them; the man working with them explains what the signals are for and what their meanings are and they will pick it up very much quicker than they would by seeing the signals or getting them out of a book and being told about them and not seeing them.

Q. The signals are hand signals, is that right?

A. Part of them are, and part of them are fixed signals on these switch targets, and the main line signals in getting in and out of the yards.

Q. You say that you paid the five dollars a day even should a person who is engaged in cubbing be on the

premises five or six hours during a twenty-four hour period?

A. Yes, we have and especially in the wintertime when the days are short I would tell them not to go to work or get out in the yard until daylight for their own safety, and it would possibly be seven-thirty or eight o'clock before they would actually participate in anything about the engines or the operations.

Q. Now, the regularly employed switchmen, those on the payroll, suppose that they work only two or three or four hours and for one reason or another cannot complete a day's work, do you pay them $8.54, or how is that handled?

A. They get—if it is a case of sickness or injury they get the full day's pay, and the man that we call in his place gets a full day's pay.

Q. You said that you had about three hundred switches, if I recall correctly. Could you give me an estimate of about how many of these are thrown by hand?

A. Well, it would be practically all of these three hundred thrown by hand; on the interlocking plants there is, let me see, I can count them; there would only be ten switches that is handled by the operators in the towers, and that is for going out on to the main tracks. The towerman keeps these switches locked so that no one can get out on to the main line until he is ready for them to proceed on the main line.

Q. Would it be a true statement or not a true statement that just about every time a move is made, some switches have to be thrown?

A. Most every move they make, it is come pull up over the switch and throw it and go one direction, and pull back throwing switches and go another direction, it is practically pulling back and forth over the switches, throwing them and going to the different tracks all day long in the yard.

Q. You also spoke about the fact that it takes some persons quite a bit of time to learn the various operations involved in the yard and so forth, which you have testified to. Now, does it sometimes appear to you that a fellow is not suited for railroad work?

A. Well, yes, we do have cases where they are slow picking it up, but after they do get it they usually make an awful good man if they continue with it. Now—

Q. If a fellow is—; pardon me for interrupting.

A. Go ahead.

Q. Complete whatever you were going to say.

A. I was going to say that a number of them have on their own accord saw that they would not make a railroad man and given it up.

Q. If it appears to you that it is going to take quite a long time for a man to learn his job, as you put it, do you tell the fellow that he had better stop cubbing, that he is not suited, or do you let him come back?

A. I usually let him make his own decisions; I don't recall of telling one yet that he wouldn't make a railroad man. We give him all the chance in the world to make good.

Q. The job of a switchman is pretty strenuous physical work, is it not?

A. Well, the physical work is not so hard, as the main object in the work is the knowing what to do and when to do it and where to be.

Q. These switchmen have to climb cars, do they not?

A. They have to climb cars in some cases, not often. Now, a part of our districts, as I have stated, where there are all hills, when they leave cars they have got to get up there and wind the handbrakes up for safety, but that is not general all over the yards.

Q. In cases where cubs have quit, have they not said as reasons for quitting that the work was too hard on them?

A. Well, I don't know whether they did say it was too hard or whether they didn't like it. I believe we did have one man that had been a railroad man, but he had been a main-line brakeman and I believe he did say that the work was a little too hard on him.

Q. Have some cubs quit you before they were put on the extra board stating that the work is too dangerous and they would rather not be working as a switchman?

A. I don't recall of any stating that they would not like it on account of the danger part of it. We have had

a number of them quit before they completed their cubbing, stating that they were not going to like the railroad work, but they didn't stress the fact that they were afraid of the danger.

Q. You said that the cub does no productive work for the railroad, I think, Mr. Whitten. Just what did you mean by that?

A. He does not do anything as far as being a benefit to the railroad company or the operations of the work, to the job he is with. He does throw the switches; he does cut off some cars with the other man guiding him, leading him and showing him and telling him what to do. I wouldn't consider that as being productive for the company as this other man is handicapped by him being with him, and he is leading him around and showing him every move for his own safety as well as the safety of the fellowman and the fact of the cars that he is on.

Q. By having these persons cub, as matter of fact, is it or is it not true that you are creating a pool of extra men to call on in case there is a job open?

A. Yes, we have to have an extra board; the contract calls for an extra board of enough of men to let the regular men off when they desire to be off. We carry an extra board from twelve to seventeen men when we can get them, and if we get too many men on this extra board and there comes a slack spell in the good weather that the older men don't lay off for maybe five or six or seven days, then the older men come to me and tell me, "We have got too many men on the board, you will have to reduce it," and naturally the last man that was put on has to be cut off.

Q. It does not cost the company any money to cub a man, or does it?

A. Well, I would think it would, from the fact that it slows up the operation that he is on, for that engine.

Q. How would it slow up the operation?

A. This man that he has got with him has got to watch him; he has got to watch his own cars, he has got to watch himself, he has got to be easy with this man, not get him hurt, and explain to him all the conditions and naturally it slows up the movement of this engine considerably in the run of a week, by him taking his time to ex-

plain every move to this man; when he goes to switching it would naturally slow that engine's operations, wouldn't it, during the day?

Q. You mean to say that in the course of a week, not as many cars would be switched or whatever work has to be done on a crew with a cub on it than at other times?

A. There might be approximately the same number of cars would have to be switched, but it could not be switched in the eight hours or ten hours whatever he is with this crew, and the next shift would have to do it or it would be necessary to call an extra engine to get caught up.

Q. Have you ever made a study of that matter?

A. I have watched the operations of the boys that have had these cubs.

Q. As a matter of fact, because there is this extra man with the crew and because he is probably told to go ahead and throw that switch, it actually expedites the work, does it not?

A. It wouldn't expedite the work, no, not a bit in the world for they have got to be too careful with him; they have got to be careful and see that he throws the right switch; they won't let him run as fast with an inexperienced man, the engineer, they send him on slow if they are going to let this man cut off a car; they will slow up the engineer so that the man won't fall or stumble over something; they try to protect the man the best way they can to see that no accidents or injuries happen.

Q. Do you accept applicants for positions of switchmen if there are no positions open on the extra board at that time?

A. No, not if we don't see that we are going to need him by the time that his training is up, why we don't start him.

Q. Mr. Whitten, as a matter of fact, don't these persons applying for positions as switchmen, while cubbing cub daily, sometimes seven days a week?

A. Some of them do, yes.

Q. As a matter of fact, most of them do, do they not?

A. Most of them do; we have had occasion where they would not want to come in on Sunday, or may have something that they want to do and they call up and tell me,

"I won't be there tomorrow," will it be all right with me, and I say, "Perfectly all right; come in when you are ready."

Q. Mr. Whitten, you stated that these switchmen were furnished here with a verbal or written authority to cub; now, when did you start using this written authority to yardmen for use in connection with the cubbing of switchmen?

A. I don't remember the exact date; it is sometime either before or after the first of the year.

Q. As a matter of fact, wasn't it in February or March of this year?

A. It might be; I don't remember the exact date; it was sometime in the year past.

Q. Do you remember whether this new form which you are referring to was inaugurated only after this suit was filed?

A. I don't remember whether it was or not.

Q. The written authority which is referred to is a sheet which reads as follows: "Chattanooga, Tennessee. Yard foremen, switchmen, yard engineers, this will be your authority to permit the bearer, cub switchman ..... to ride your engine for the purpose of familiarizing himself with the duties of switchman.

"Please see that he is thoroughly instructed in all duties pertinent to switching, in safety first rules, and after he has, in your opinion, qualified himself, sign your name to this letter." Signed, "General Yard Master."

Underneath are provided blank spaces for the signatures of the foreman with whom the switchman has cubbed.

A. That's right.

Q. Now, this form, Mr. Whitten, according to your best recollection when was this form first used?

A. I don't remember what time the first one was used.

Q. Prior to the use of this form here, did you use any other written form?

A. We would verbally tell the foreman and would tell him to give us a card with his signature on it when this man worked with him, cubbed with him, and then we would talk with him and ask him what he thought about the man and his ability to learn the job.

Q. Mr. Whitten, did you have occasion recently to check how many of these written permits which have been filled out, you have on file?

A. I haven't checked back over to see how many of them we have on file.

Q. Have you not checked only last week with me to see how many you had there?

A. That was the only time.

Q. And how many did you find?

A. I believe it was two.

Q. And were they all dated in either February or March of this year?

A. I don't remember what the dates on them were.

Q. Do you remember whether they were in 1945?

A. I believe they were 1945.

Q. I hand you herewith such a permit for P. B. Turner, dated March 9, 1945.

A. Yes.

Q. Would you look that over and state whether or not that appears to be a true copy?

A. Yes, this appears to be a copy of the form that we give to the foreman.

Q. I have another written permit dated March 17, 1945, which also was by Mr. Porter; I will show you this and ask you whether that is the second of the permits that you were able to find at that time.

A. That appears to be a copy of what we have on file.

Mr. Cadra: That is all.

Mr. Whitwell: That is all.

Further saith not.

JOHN HARRISON WHITTEN.

I hereby certify the foregoing transcript to be a true and correct transcript of the testimony of John Harrison Whitten, taken before Joe Hunter, Notary Public in and for Hamilton County, Tennessee, on May 8 and 9, 1945.

FRANCIS J. McSWIGGAN,
Certified Shorthand Reporter.
(N. Y. S. Certificate #191.)

TRANSCRIPT OF EVIDENCE.

Appearances:

For the Plaintiff, Jeter S. Ray, Geo. W. Jansen and Paul M. Cadra.

For the Defendant, Walton Whitwell and Edwin F. Hunt.

This case came on to be heard on Wednesday, May 16, 1945, when the following proceedings were had:

Judge Davies: Gentlemen, I want to introduce to you my associate, Judge Louie W. Strum of Jacksonville, Florida, and he will try this case.

Mr. Ray: May it please your Honor, I want to introduce to your Honor Mr. George W. Jansen, Supervising Attorney, Office of Solicitor, United States Department of Labor, who is here to try the case for the Government.

Judge Davis: All right. We are glad to have you with us.

(Thereupon Judge Davies retired and Judge Strum proceeded with the trial of the case.)

The Court: Gentlemen, I have read your pleadings and I know what the issues are and I think if we discuss the situation a little here we can simplify the matters that will be litigated.

I notice by reading the pleadings that the Defendant says that as to all trainees except brakemen—and what else have you—firemen, brakemen and switchmen, that it is now in compliance with the Act and has been for sometime past. Now, is the Plaintiff conceding that to be the case?

Mr. Jansen: The Plaintiff does not concede that, if your Honor please.

The Court: Well, in what respects do you now contend that they are not complying?

Mr. Jansen: May it please the Court, we contend that the Defendant has failed to pay many of its employees, men

who have cubbed for yard clerks and other jobs. It is true the Defendant does, in its answer, allege that it is in compliance but we have information and expect to prove that they are not.

The Court: Well, do you have witnesses here to testify that they have worked in these capacities that received wages less than those prescribed by the Act?

Mr. Jansen: We have, your Honor.

The Court: Well, the Court will hear you then if that is the case. Now, as to firemen, engineers, switchmen, you claim that the situation is the same, do you?

Mr. Jansen: We claim that the situation is the same, yes sir, your Honor. We claim that many firemen, switchmen and brakemen are being employed by the Defendant without payment of the minimum wage prescribed by the Act.

The Court: Well, what do you want to say for the Defendant, Counsel? Do you agree with what counsel for the Plaintiff has just stated here or do you still insist that you are complying with the Act as to these office employees, other than firemen, switchmen and brakemen?

Mr. Whitwell: May it please the Court, our position is as set out in the answer, that when the Wage and Hour Act became effective the management of the Company elected to treat the Act as if applicable to persons posting for positions such as porters, callers, clerks, stenographers and messengers and that then the management issued instructions to its supervisory officers to pay persons posting for these various clerical positions and the management insisted that that be carried out.

The Court: The Chattanooga suit was instituted and dismissed and since that time you say that they have been paid?

Mr. Whitwell: Since that time they have gone back and taken the list, as best they could arrange it and have issued instructions that these people be paid and vouchers have been issued to those, substantially all of them, and to every-

body who they could locate these vouchers have been delivered, or have been issued.

The Court: What about currently since—what was that date, November, 1944, you say?

Mr. Whitwell: Yes, sir.

The Court: You corrected that situation at Chattanooga?

Mr. Whitwell: Yes, sir.

The Court: Since that time have you currently paid this type of persons that we are speaking of here now the wage and hour scale or more?

Mr. Whitwell: Yes, sir.

The Court: Well, I want to ask counsel for Plaintiff here as of what time do you intend to now claim that they have paid sub-standard wages to these office employees, way back yonder or since November, 1944?

Mr. Jansen: May it please the Court, the Defendant, in its answer alleges that failure to pay office employees existed with regard to the Cravens Yard only and that they have since corrected it. We deny that they have corrected it and we also deny that it exists with reference to the Cravens Yards only.

The Court: Now, if they are in compliance with this Act now as to any of these people, then unless there is some reasonable ground to suppose that they are going to violate the Act in the future, there is no use litigating about something that the Defendant is already complying with, so, unless you want to show that they are now presently failing to observe the Act, why, there is no use litigating about something that occurred way back yonder a year or two ago.

Mr. Jansen: May it please the Court, we propose to show not only that they have failed to comply but also that there is reasonable ground to suppose that they will not comply in the future.

The Court: I see. All right. Well, I am ready to proceed. Call the witnesses for the Plaintiff.

(Witnesses called and sworn.)

The Court: Do you want to make further formal statement to the Court for the Plaintiff?

Mr. Jansen: No, may it please the Court.

The Court: Proceed.

EVIDENCE ON BEHALF OF THE PLAINTIFF.

W. J. McWHORTER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is W. J. McWhorter?
A. That is right.
Q. How old are you, Mr. McWhorter?
A. Sixty-two years of age.
Q. Where do you live?
A. Nashville, Tennessee.
Q. And how are you employed?
A. I am Acting General Manager of The Nashville, Chattanooga & St. Louis Railway.
Q. How long have you been Acting General Manager of The Nashville, Chattanooga & St. Louis Railway?
A. Since March 13th, this year.
Q. Before that time how were you employed?
A. Assistant General Manager.
Q. How long were you Assistant General Manager?
A. Seven years.

Mr. Jansen: If it please the Court, the Plaintiff desires to call this witness as an adverse witness under the rules.

The Court: Well, proceed.

By Mr. Jansen:

Q. Now, Mr. McWhorter, how long have you been with The Nashville, Chattanooga & St. Louis Railway?
A. Forty-one years.

Q. And what position did you start with with the Railway?

A. Telegraph operator.

Q. And then you went through the various types of jobs until you became Assistant General Manager and now are Acting General Manager?

A. That is correct.

Q. I presume you are familiar with the operations of the Railway, the location and general operations of the Railway?

A. I think so, yes, sir.

Q. Now, The Nashville, Chattanooga & St. Louis Railway is a system which extends from Memphis to Atlanta, is that correct?

A. Memphis to Atlanta, and also to Hickman and Paducah, Kentucky.

The Court: Now, Counsel, let's don't start with a lot of things that are not in issue. Nobody denies that in these pleadings. That is admitted. Now, let's get right down to what is in dispute here and litigated. All right, go ahead.

By Mr. Jansen:

Q. Mr. McWhorter, you are familiar with the issues in this case?

A. In a general way, yes, sir.

Q. You have in your employ brakemen, switchmen, firemen and engineers, have you?

A. Yes, sir.

Q. Until December, 1943, it was the practice of your Railroad to cub men for the jobs of fireman, switchman and brakeman, is that correct?

A. That is correct.

Q. You still cub men for the jobs of fireman, switchman and brakeman, do you not?

A. That is correct.

Q. But prior to December 1st, 1943, you paid those cubs during the cubbing period no compensation whatsoever, is that correct?

A. That is right, in recent years. Now, what the practice was way back twenty-five or thirty years ago I just don't know.

Q. Didn't you have a practice during the last war of paying cubs $1.00 per day?

A. During the last war—I am not so positive about that. I think there was a period in there about that time but whether it was during the war or immediately following, I just don't recall.

Q. In any event, around the time of the first World War you paid wages to cubs of about $1.00 a day as you recollect it?

A. No, we were not paying wages. We paid $1.00 a day, however, for the cubs to enable them to support themselves.

Q. Do you claim that money you paid was not wages?

A. That is the way we considered it, yes, sir.

Q. And the money that you have paid certain cubs since December 1st, 1943, do you claim that that is not wages?

A. That is right.

Q. What do you claim it is?

A. Well, it is money to help defray their expenses during the training period.

Q. How much have you been paying cubs since December 1st, 1943?

A. $5.00 a day.

By the Court:

Q. Firemen, engineers, switchmen and brakemen?

A. Yes, sir.

Q. Now, that is cubs for positions of fireman, switchman and brakeman. The others you don't pay at all?

A. Students for clerks?

Q. Yes, sir.

A. Yes, sir, we pay them.

Q. You pay them, too?

A. Pay them the minimum rate provided by the Fair Labor Standards Act.

Q. While they are in training?

A. That is right.

The Court: I see.

By Mr. Jansen:

Q. Now, this $5.00 per day you pay cubs you claim is not wages?

A. That is my position, yes, sir.

Q. You claim you don't pay that to them as compensation for services performed, is that correct?

A. That is right.

Q. That is an emergency measure your Company has adopted since the war, is it not?

A. Yes, sir, it was adopted since the war as an inducement or incentive to get men to train for those positions.

Q. And is a measure that was adopted by the Company because of the present war and because of the shortage of men?

A. That is right, because of the shortage of manpower brought on by war conditions.

Q. Yes, sir. And you claim that that is nothing more than an inducement to get them to come on and take your training, is that right?

A. That is right.

Q. That is, I assume, a measure that was adopted for the duration of the war or the present manpower shortage, is it?

A. Well, there is no fixed time as to the continuance of that policy. Just how long it will be continued I don't know.

Q. Was it adopted as the result of some agreement with the brotherhoods?

A. No, it is only on the volition of the management.

Q. You had no agreement at all with the brotherhoods with regard to this money that you are paying cubs at all?

A. None at all.

Q. Now, in your answer you allege that it is the result of some joint conference. Do you have any record of any joint conference between the management and the labor representatives?

A. I have copy of a letter from Mr. J. J. Pelley, who is president of the Association of American Railroads with respect to a conference between the labor representatives

and the representatives of management participated in, I believe, by the ODT representatives.

Q. Did you participate in that conference?

A. Personally, no.

Q. So it is your idea that you did this of your own volition?

A. That is correct.

Q. Now, all of the cubs for the jobs of switchman, brakeman and fireman are not given this $5.00 a day, are they? I mean by this, those who do not complete their training don't receive the $5.00 a day?

A. Well, that was my original instructions, effective December 1st, 1943. I directed the superintendents to pay persons cubbing for the positions of fireman, brakeman and switchman $5.00 a day except those that might cub for a short time and leave of their own volition.

Q. Did you bring with you a copy of those instructions?

A. Yes, sir.

Q. May I see those, please?

(Papers handed to counsel.)

Q. Are these all copies of the same thing?

A. Yes, sir, several copies of the same letter.

Q. They are identical copies, are they?

A. Yes, sir.

Q. Suppose we just take one. Now, I call your attention to a letter which you have just handed to me. Will you tell me what that is?

A. Well, it is a letter directed to the division superintendents with respect to the payment of student firemen and student brakemen, effective December 1st, 1943 in the amount of $5.00 per day.

Mr. Jansen: I will ask that this be marked Plaintiff's Exhibit No. 1.

(Paper so filed and marked.)

Q. Mr. McWhorter, do you have some subsequent correspondence with your division superintendents regarding this $5.00 per day?

A. Well, there was some subsequent correspondence in which questions were asked, etc.

Q. Do you have that with you?

A. Not all of it.

Q. Do you have any of it with you?

A. There was quite a voluminus file on that. I have a letter here addressed to Superintendent Swindell at Atlanta, December 15th.

The Court: Why should we go into all this detail about it? They admit they didn't pay those people anything but $5.00 a day. Now, that is evidence and that is what you are complaining about, so why go into all these details and give all the reasons for it?

Mr. Jansen: They admit they didn't pay them. Then I want to establish the situation with regard to these trainees who didn't complete their training.

The Court: Well, he admits, as to those, he didn't pay them anything. So that is what you are complaining of and I don't see any point of going into the details about it. He admits the fact, the ultimate fact.

A. May I state this, that the December 1st, 1943 instructions do not require payment for those cubs who left of their own volition but sometime ago information came to me that some of those cubs at least were under the impression that they were to be paid $5.00 a day, even though they may have left of their own volition. Well, in view of that impression in their minds, to be perfectly fair with them, I instructed the superintendents to pay those men $5.00 a day for the days that they cubbed.

By Mr. Jansen:

Q. Those men who had that impression, you say?

A. Pay them all because I didn't want to be partial to some few and the others let go but the purpose of that payment was due to the impression gained by some of them that they were to receive $5.00 a day. We want to treat them all alike.

Q. Have they been paid this $5.00 a day?

A. As far as I know. The instructions have been issued.

Q. How long ago were those instructions issued?

A. Oh, I would say probably two or three months. I am not positive as to the date.

Q. And you think that all the men who didn't complete their training have been paid $5.00 a day for the days that they were there?

A. I think those that could be reached have been paid. Now, that was my instructions. I can't say whether they have all been paid or not.

Q. And those instructions were issued, you say, because of an impression that the men got that they were to receive $5.00 per day whether they completed their training or not?

A. That is right.

Q. And that was not considered by you as wages?

A. No.

Q. And that $5.00 is an emergency measure, you testified?

A. It has gone to the cubs as subsistence to help defray their expenses while out on the road and to help take care of their families. Now, when we decided to pay this $5.00 a day there was a great many of our young men being drawn into the military service and it looked as if practically all of the young men would be sooner or later drawn into the military service and we undertook to get men thirty-five and forty years of age and practically all men in that age group had families and we felt it was nothing but right and an inducement to get men to pay them $5.00 a day to help support them during this non-employment period.

Q. Then if I understand you correctly, you don't admit that those men are employees while they are cubbing?

A. No, sir.

Q. And you don't admit that the $5.00 is wages that you pay to employees while they are cubbing?

A. I do not, no, sir.

Q. Now, with regard to these instructions that you say have been issued within the last couple of months to pay

these men who did not complete their training, were they written instructions?

A. As I recall, they were. I haven't copy of the instructions with me but if they were written they are in my files in the office.

Q. You don't know when those payments were made to those men who hadn't completed their training?

A. No, I don't have anything to do with that feature of it. That is in the accounting and paymaster's offices.

Q. These instructions that you speak of to pay these men who had not completed their training were issued after this suit was started, were they not?

A. Yes, sir, I think so. As I recall, my first information of the suit was the latter part of last year, November or December. I am quite sure that the instructions were issued subsequent to that time.

Cross Examination,

By Mr. Whitwell:

Q. Mr. McWhorter, prior to the time that you became General Manager and Assistant General Manager what position did you hold with the Company?

A. Since my first employment?

Q. Immediately prior to that. I don't want to go into all of that.

A. Immediately prior to my promotion to Assistant General Manager I was superintendent on the Nashville and Paducah and Memphis Divisions. I held that position for ten years.

Q. Now, during the time that you held that position and, of course, since that time have you been familiar with the Company's practices in reference to applications and the cubbing of persons who filed for positions of brakemen, firemen and switchmen with The Nashville, Chattanooga & St. Louis Railway?

A. I have.

Q. What has been the Company's practice in reference to the different steps that an applicant goes through that lead up to employment for the position for which he has applied?

A. When an applicant applies for the position of fireman or brakeman he is first required to fill out an application blank or form, which requires his name, age and prior service, if any, references, etc. And then he is also required to undergo a physical examination to determine whether or not he is fit physically for the position sought. And then he is put on the road, in the case of a road fireman, to cub with a regular fireman, and in the case of a brakeman, he is put on the road to cub with a regular brakeman and regular conductor.

Q. Now, Mr. McWhorter, is this practice that you speak of or not one of long standing with this Company and among railroads generally throughout the United States?

A. It is, yes, sir.

Q. Now, why is it necessary for an applicant to cub or train before he will be employed by the Company for the position applied for?

A. Well, there are many angles of the position to which the applicant must conform himself. In the case of the applicant for position of brakeman he must learn the road, learn the duties of a brakeman such as coupling and uncoupling cars, performing station switching; he must know the location of the various stations and the tracks that might have to be switched and he must inform himself with respect to protecting the rear or front of his train in case such protection is required. And then he is required to undergo an examination on the rules, operating rules. He must know those rules in order to successfully and safely perform the duties of a brakeman and protect himself and protect the men with whom he works.

Q. Is there any school that you know of, Mr. McWhorter, where a person applying for the position of switchman or brakeman or fireman on The Nashville, Chattanooga & St. Louis Railway can get his training?

A. I don't know of any such school.

Q. If there were such a school would he still have to cub or train for a period in order to learn the physical location of switches, sidetracks, housetracks, stations and various things along the railway of the NC&StL Railway?

A. Definitely he would.

Q. If a person comes to the NC&StL Railway and makes

application for one of these positions even though he may have had prior railroad experience with some other railroad, would it still be necessary for that man to undergo training or a cubbing period in order to learn these different locations on the line of road and the various things about which you have just made a statement?

A. He would, yes sir.

Q. Now, Mr. McWhorter, generally speaking, upon what does the length of this training period necessarily depend?

A. Will you please restate that question?

Q. Upon what does the length of the training period, the time that it takes an applicant to learn the duties of a brakeman or switchman or fireman on a given division? Upon what does that depend?

A. That depends upon the aptitude of the man, his ability to grasp and understand. Some men can get things of that sort quicker than others.

Q. Would the question of whether he had prior experience with other railroads enter into the picture?

A. Yes sir, that would help to the extent of enabling him to finish his cubbing period quicker by reason of the fact that he would know of car handling such as coupling and uncoupling cars, how to throw switches and things of that sort.

Q. Would or not it also depend upon the miles of road, the length of the road and the number of stations, number of switches, number of yards, number of sidetracks and various things like that?

A. That is true. He would have to learn all those various things.

Q. Now, under whose supervision does this man train while he is preparing himself for the position sought?

A. In the case of a cub brakeman, he trains under the supervision of the crew to which he is sent and on which he is placed for training. In the case of a cub fireman, why, he is under the supervision of the regular fireman on the engine where he is cubbing, and also the engineer.

Q. Does or not that person cub with the regular crew, a full crew?

A. Yes sir.

Q. Does this cub, while he is cubbing, have any duties

or any responsibilities whatsoever in connection with the operation of that train or any other railroad operation?

A. He does not.

Q. Who does have that responsibility?

A. The regular crew employed on the train and paid for that purpose.

Q. Does he, insofar as your experience goes and as far as any knowledge goes, perform any manual activity that a regular man is not there ready and prepared and paid to perform?

A. I don't know of any, no sir.

Q. Does the Company receive any benefit from the activity of the cub during the period while cubbing?

A. It does not.

Q. If, for example, a person cubbing for the position of brakeman, should get on a train at Nashville that is destined for Cowan or Chattanooga and that cub, we will call him, decides for some reason or for no reason to get off the train at Murfreesboro, does that train go on just the same?

A. Just the same, yes sir.

Q. When, if any time, does the Railway first begin to receive benefit by reason of the fact a person has cubbed for one of these positions?

A. After he has completed his training period or his cubbing period and is placed on the extra board where he is subject to call for service. Then the training and knowledge gained during that training period is beneficial to the Company by reason of his ability to carry on as a regular or extra employee.

Q. If a person cubs for the position of brakeman, switchman or brakeman and never completes his cubbing and never goes on the seniority roster of employees and never works as a regular employee does the Railway ever derive any benefit at all by reason of the fact that that person cubbed?

A. None whatsoever.

Q. Is it necessary for that person to cub from the standpoint of his own safety?

A. It is.

Q. Is this person, while cubbing, subject to any of the rules of the Company that are applicable to its employees?

A. No sir.

Q. Is he subject to any discipline or any control by the Company?

A. He is not.

Q. Now, Mr. McWhorter, you said that prior to December 1, 1943 that persons applying for positions of brakemen or firemen or switchmen weren't paid any amount during the cubbing period. I believe that is what you said.

A. Yes sir. That is for several years prior to December 1, 1943.

Q. Now, you say that effective December 1st, 1943 the NC&StL Railway adopted the policy of making what you term incentive payments of $5.00 a day to such persons during their cubbing period, provided they completed their cubbing, and that later you understood that some of the persons who did not complete their cubbing period understood that they were to be paid $5.00 or misunderstood the instructions, however you want to put that, and, therefore, you issued instructions that those men be paid this $5.00 a day whether they completed their cubbing or not, is that correct?

A. That is correct. I might add there that I didn't want them to feel that probably they had been done an injustice and left with a misunderstanding.

Q. Did the fact that you made these $5.00 payments to these persons—was that influenced or controlled by this lawsuit in any manner?

A. None whatsoever.

Q. In making that $5.00 payment were you undertaking to comply with the Wage and Hour Law or were you simply arriving at a subsistence or expense figure or incentive figure?

A. I had no information with reference to the Wage and Hour Law. I was trying to determine an amount that would at least be helpful in defraying the expenses of these cubs while away from home and also help support their families while they were away.

Q. Was that payment of $5.00 a day purely voluntary on the part of the Company?

A. Absolutely.

Q. Could, as you understand it, it be withdrawn at any time?

A. Yes sir.

Q. Could it have been $2.00 a day or $4.00 a day or $6.00 a day as well as $5.00 a day?

A. It could have been any amount that we might have decided to allow.

Q. Does it carry with it any reference in any manner to overtime or anything like that?

A. None whatever, no sir.

Q. If it had been a payment arrived at to be paid to an employee would it necessarily have been negotiated by collective bargaining and negotiations with the trainmen's organization?

A. It would have.

Q. Now, you spoke of this national committee that Mr. Jansen called your attention to. I believe this committee referred to making recommendations was a national committee?

A. That is right.

Q. Composed of representatives of the different trainmen's organizations and representatives of railroad executives of the country?

A. That is right.

Q. And I believe you said the ODT had something to do with it?

A. That is right.

Q. And I believe you said that one of the recommendations of the committee, of which the labor organizations was a part, was that the railroads consider making payments to persons while cubbing during that pre-employment period, is that right?

A. That is correct.

Q. Now, will you turn to that recommendation No. 8 and read to us just what that recommendation was?

A. (Reading) "No 8. Training. It was agreed that the conditions for the duration would require more intensive on—as well as off—job training and some pre-employment training. It was suggested that on-job training might be accomplished by increase of supervision, placing trainees in gangs with qualified workmen and rotating

trainees, the purpose being to make fully qualified employees of the trainees in the shortest practicable time. It was suggested that the off-job training might be accomplished in school rooms, during working hours or after working hours, or by correspondence courses. The pre-employment training would involve prospective employees who would have to be trained before they could enter service. This training would probably be through the schoolroom method. As an aid to obtaining necessary manpower the railroads should consider the payment of compensation to men during the pre-employment training periods."

Q. In other words, that committee used the language: "Pre-employment training periods", is that right?

A. That is right.

Q. Now, are rates of pay for regular employees for the positions of brakemen, firemen and switchmen, are they left to the judgment and discretion of the management of the Railroad or are they arrived at by negotiation and collective bargaining, mediation and things like that?

A. They are not left to the determination of the management of the railroads. They are determined by negotiation between the representatives of the employees and representatives of management, and if those parties are unable to agree, either party may invoke mediation. If mediation fails to bring them together, then arbitration is suggested.

Q. Now, in those cases of regular employees where a wage rate is agreed upon by the Railway and the representatives of those organizations may a railroad company voluntarily withdraw that rate of pay?

A. No, that becomes fixed, and can only be changed by at least thirty days written notice, at which time the representatives of the employees can come in for a conference and discuss it.

Q. Now, when this person who has cubbed during the period when you have been making this incentive payment of $5.00 a day, when that person completes his training period and otherwise qualifies and becomes enrolled upon the roster of employees and starts to work, does that $5.00 a day follow him or is he then paid a different compensation arrived at by a different method?

A. He is paid different compensation determined by entirely a different method, as I have just described, by negotiation between the representatives of the two parties and that becomes a fixed rate for that particular job.

Q. And is it greater or less than this $5.00 about which you spoke?

A. It is greater.

Q. Does that person, upon becoming an employee and going to work, draw the same rate, contractual rate of pay that any other person in that type of employment draws who has been working for a number of years?

A. He does, yes sir.

Q. Now, Mr. McWhorter, I want to ask you a few questions about this posting. What instructions, if any, did you issue to the various superintendents in reference to paying persons while posting for positions such as porter, caller, messenger, stenographer and clerk?

A. My instructions with reference to such has been, with reference to such students was to pay them an amount equal to the minimum provided by the Wage and Hour or the Fair Labor Standards Act.

Q. Was that back, sometime back when the Act became effective?

A. Well, when the Act became effective, October 24th, 1938, I believe it was, we were not putting on any students. In fact, we had some employees cut off and ready to come back as soon as business would justify their return, and for some two or three years or probably a little longer there was no need to post people for employment such as clerks, stenographers, callers, etc.

Q. Did those instructions go out to the superintendents of the various divisions of the NC&StL Railway?

A. Yes sir.

Q. As far as you know until recently, until after this suit was brought were those instructions being carried out?

A. They were as far as I knew, and to warrant that belief, I had received many letter from superintendents asking for authority to put these student clerks, stenographers, callers, etc. on in order to permit them to train for those respective positions.

Q. And so far as you know now, have those instructions been carried out at every place except at Chattanooga?

A. Yes sir.

By the Court:

Q. Have they originally been observed and are now being observed at Chattanooga?

A. As far as I know they are now being observed at Chattanooga.

Q. You pay all the messengers, porters and everybody except the student employees in accordance with the Wage and Hour Act, do you?

A. Yes sir.

Mr. Whitwell: I wanted to just briefly give you a picture.

Q. Now, Mr. McWhorter, when did it first come to your attention that your instructions with reference to paying these people posting at Chattanooga had not been carried out?

A. Well, it was sometime after this lawsuit was filed. I don't recall the exact date. It was developed that some people at Chattanooga had been posting without pay and we immediately asked the superintendent to give us the names of applicants and the positions for which they had posted, and when we received that information we issued vouchers for payment of all time consumed in posting at the minimum rate provided by the Act.

Q. I will ask you whether or not that situation, that isolated situation at Chattanooga was called to your attention and the attention of the Railway as a result of the investigation which inspectors of the Wage and Hour Division had evidently made, which brought about this lawsuit?

A. It was, yes sir.

Q. Now, you say that vouchers have been issued and effort has been made to go back and pay all those persons for the period while posting and comply really with instructions which you originally issued, is that true?

A. That is correct.

Q. Now, has that situation at Chattanooga and else-

where wherever it might develop in isolated instances been corrected?

A. As far as I know, it has. I instructed that it be corrected. So far as I know, they have been paid.

Q. Since this matter has been brought to the attention of the Railway have you instructed the departmental superintendents to pay all the persons from that time on in the future the minimum provided by the Wage and Hour Law and to keep record of the days and hours posted?

A. Yes sir, I have.

Q. In other words, the present practice—the erroneous practice there in reference to your instructions has been corrected and presently you are treating the Wage and Hour Law as if it applies and are complying with it, is that right?

A. That is correct.

By the Court:

Q. That is true as to all except student brakemen, switchmen and firemen?

A. Well, we are now paying student brakemen, switchmen and firemen.

Q. Are you paying them $5.00 a day?

A. $5.00 a day.

Mr. Whitwell: But your Honor is right. What I am developing is with reference to people who post and not people who cub for positions of firemen, brakemen and switchmen.

I believe that is all.

Redirect Examination,

By Mr. Jansen:

Q. Do I understand that your Company now admits that persons who post for jobs of yard clerk, porter, stenographer and other office positions, while they are posting are employees?

A. No, I don't think I said that.

Q. Well, what is the fact? Do you admit that they are employees or do you not?

A. No, I don't consider that they are employees.

Q. Well, will you explain why you consider the men in the office differently from switchmen, brakemen and firemen?

A. Well, in the case of a clerk or stenographer, messenger, caller and positions like that we concluded that there was the possibility that such student might perform a service that would be beneficial to the Railway while out posting with the regular employee and for that reason we did not want to be caught in the position of having such student perform a service to the Railway without compensating him as required by the Act.

Q. Is there any other reason for the distinction between the office help and brakemen, switchmen and firemen?

A. No, that is the only reason that I know of.

Q. Now, with regard to switchmen and brakemen, I believe you stated that the trainee is in addition to the regular crew, is that right, in addition to the crew?

A. I don't know that I exactly understand your question.

Q. Well, is the trainee an extra man with the crew?

A. No, I wouldn't use the expression an additional member of the crew.

Q. No, no?

A. He is just out there to learn the duties of this particular job.

Q. He is, I believe you said, an extra man on the crew?

A. No, I wouldn't say that because employees are known as extra men, brakemen and firemen who qualify, those cubs who qualify for those positions finally go on the board and they are called extra men. Now, they are regular employees.

Q. Now, I am not talking about the men on the extra board. I am talking about the trainee who is with the crew. Let's take, for example, a switchman. What is your regular assigned crew in switching operations, the ground crew?

A. The ground crew consists of a foreman and two switchmen.

Q. And that is the usual assigned crew?

A. That is true.

Q. So if a cub is with the ground crew of a foreman

and two switchmen he would be there as an addition to the regular crew? I mean he wouldn't be part of the crew, you claim, but he would be there an extra man?

A. He wouldn't be a part of the crew; neither would he be an extra man.

Q. Well, you consider him then sorter like the fifth wheel of a wagon?

A. He is just out there learning the duties of that particular work.

Q. And you consider that he is there a sort of fifth wheel on a wagon?

A. I never considered him as a fifth wheel, no sir.

Q. Now, has it always been the practice of the Railroad, your Railroad to limit its crew, its ground crew in switching operations to a conductor and two switchmen or brakemen?

A. No, we have had periods where the crew consisted of different numbers.

Q. You have had periods, as a matter of fact, Mr. McWhorter, where the crew, the ground crew in switching operations was as large as seven, haven't you?

A. The ground crew?

Q. Yes sir.

A. No, not with a regular switch engine. Now, if you are thinking about hump jobs where we switch cars over a hump you will find a condition of that kind.

Q. And you have had ground crews where the number in the crew was as many as six?

A. No. Excluding hump crews, we have never had any such size as an ordinary switching crew.

Q. What is the largest number of men that you have carried at one time on a single switching crew in switching operations?

A. Well, I think we had two or three jobs in Atlanta several years ago where we had three switchmen. That was on account of the work being far in excess for a crew of two switchmen and a foreman.

Q. You always have just one foreman or conductor?

A. That is right.

Q. On a crew but it is not uncommon or at least it has not been uncommon in the past to have a number of

helpers, that is, switchmen in addition to the conductor and varying with the amount of work to be done. At times you have had a conductor and one and at times you have had a conductor and six or seven helpers, is that right?

A. I don't know that we have ever had six or seven; I couldn't say that.

Q. Well, let me call you attention to the message of Fitzgerald Hall—he is your president, is he not?

A. That is right.

Q. And this is particularly with reference to the message of your president, Fitzgerald Hall, dated October 15, 1939, in which he says: "We have had ground crews with switch engines at various times and places ranging from foreman and one helper to foreman and seven helpers, the number of helpers varying with the amount of work to be done."

A. That is President Hall's message. I am really not qualified to interpret it.

Q. He is your superior; he is over you?

A. Oh, yes. But just what he had in mind I really don't know unless he was talking about these hump crews that I have just referred to.

Q. How about that which I have just read, just quoted to you?

The Court: I don't think it makes a bit of difference what the president says. You are examining this witness here now. If you want to find out what the president says, bring him down here and we will see about it.

Mr. Jansen: Do I understand the Court objects to the question?

The Court: I tell you that the question is immaterial, yes sir.

Mr. Jansen: Note an exception.

Q. What is the largest crew, ordinary switching crew?

A. The ordinary switching crew, as far as I know, now consists of a foreman and two switchmen and an engineer and a fireman.

Q. May it consist of a foreman and three switchmen?

A. When I say an ordinary switching crew I eliminate hump crews just previously referred to.

Q. Now, Mr. McWhorter, you said in answer to your attorney's question that one of the reasons, in fact, the first reason that you gave that you trained cubs was that they would learn the road, is that right?

A. Not only learn the road but learn the duties of the position sought by them.

Q. But the first reason you gave, as I recall it, was that they would learn the road.

A. That was one of the reasons. Whether it was the first, I don't recall.

Q. Now, as a matter of fact, Mr. McWhorter, a man who is training for a brakeman's job usually makes a run on each one of the divisions of the road, does he not, before he can take the examination?

A. No sir, not on each division.

Q. Are you familiar with the schedule that is given to each cub brakeman when he starts out in his training period?

A. Well, only in a general way. That is handled by the division people, the division superintendents, road-masters and master mechanics.

Q. In any event, a cub brakeman is given a schedule, we will say, on the Nashville Division. Is the Nashville Division just one division of the Railroad?

A. The Nashville Division and the Chattanooga Division is one seniority district. Now, men applying for positions of brakemen or firemen on those divisions are required to cub both divisions. They extend from Chattanooga to Hickman, Kentucky, and the other divisions are separate seniority districts. There are five divisions on the system.

Q. And a cub brakeman who trains on the Nashville and Chattanooga Divisions is required, you say, to cub on each division?

A. That is right.

Q. And he is required to make each of the runs on that division, is he not?

A. I don't know that I understand that question. Do you mean every run that operates on the two divisions?

Q. Each of the separate runs. You have a local train, for example, from Nashville to Bruceton?

A. Yes sir, we have several runs. We have about 57 to 60 trains a day, twenty-four hour period.

Q. But you have local trains, do you not?

A. That is right.

Q. And through freights?

A. That is right.

Q. And you have extra trains, and you have a train which starts in Nashville and terminates, that is, a run which starts in Nashville and terminates in Bruceton?

A. That is right.

Q. That is one run, isn't it?

A. Yes sir.

Q. Then you have a run which starts in Nashville and terminates in Cowan, don't you?

A. Yes sir.

Q. And a run which starts in Cowan and terminates in Chattanooga, or the reverse?

A. Yes sir.

Q. So a cub brakeman would be required to at least make a round trip on the run from Nashville to Bruceton, would he not?

A. Yes sir, at least one round trip.

Q. And then would be required to make a round trip from Nashville to Cowan?

A. Yes sir.

Q. And then he would be required to make a round trip from Cowan to Chattanooga?

A. That is right.

Q. And there are a number of other items that are included on this schedule that he is required to follow, aren't there?

A. Well, I don't know; I am not qualified to—

Q. Well, in a general way?

A. —testify as to those schedules because, as I say, that is fixed by the division people, but generally that is correct.

Q. Well, you did express an opinion with regard to the work that these cub brakemen did, didn't you?

A. Yes sir, but all those things are not specified on the schedule.

Q. I understand that. You do know, do you not, that a cub brakeman when he makes a local freight run in his training helps load and unload freight out of box cars and into box cars?

A. He may do that, yes.

Q. You know that he does, don't you?

A. I don't know that I have been on a train where we had a cub brakeman but I am sure that that is the practice because he couldn't learn the work if he didn't do those things.

Q. And when he is on the baggage run—most of them are required to make the baggage run, are they not?

A. I think so.

Q. And when he is on the baggage run he helps move baggage and load and unload baggage and makes up tickets for it; you know that too?

A. He might have to do that in an effort to learn the duties of a baggagemaster but while that is going on the regular baggagemaster is standing there ready and willing to do the work. In other words, what a cub might do in that respect would not advance the movement of the train or wouldn't advance the work.

Q. Well, if you had a cub and the regular brakeman both unloading freight you mean to say that it wouldn't be unloaded faster than if you had the brakeman alone?

A. I don't think so. I think the cub would be probably in the way and what little work he would do wouldn't certainly advance the movement of the train.

Q. Does it require any experience to unload freight?

A. Oh, yes sir.

Q. And to handle two-wheelers?

A. That is the reason we put men out there to cub for this business, to get that experience.

Q. In handling those two-wheelers, two wheel trucks that haul freight in and out of box cars?

A. That is right.

Q. Now, these cubs are given a schedule—you know that, don't you?

A. It is my understanding they are.

Q. And they are asked to follow that schedule of runs, are they?

A. I don't know just what the request is about that but it is my understanding that they are not held to that schedule.

Q. But if they miss one of the days on the schedule they give them another day at the end of it, you know that?

A. Yes sir. They may go and come at their own volition. They are not required to confine themselves to the runs specified on the schedule, if there is such a schedule.

Q. Well now, Mr. McWhorter, you know of your own knowledge that these men are given a schedule of runs, about fifteen or twenty different runs that they are asked to make during their training period, don't you?

A. But I repeat that they are not required to follow that schedule.

Q. They are given that schedule?

A. I understand that they are.

Q. And if they miss a run on that schedule they are given another run at the end, are they not?

A. I don't know about that.

Q. You don't know about that?

A. Whether they go on that run later on or what.

Q. Now, you also stated, Mr. McWhorter, that these trainees, these cubs are not held to rules. Do you have operating rules on the railroad?

A. Yes.

Q. What are some of them, just for example? Give us an example.

A. Oh, there are several operating rules. I don't know that I could quote them verbatim, but certain rules with respect to proper protection of your train when such protection is needed, and the regulation of speed through yard limits and various things of that sort. The rules are designed for the safety of employees and the traveling public. There are many of them.

Q. Well, these rules are with regard to the operation of the train, are they not?

A. Operation of the train and the railroad, yes sir.

Q. And the protection of the train, is that right?

A. Yes sir.

Q. Now, these rules apply whether there is a cub training with the crew or not, do they not?

A. You mean it applies to the regular train crew?

Q. Apply to the operation of the train, do they not?

A. No, I wouldn't say that because a cub couldn't comply with the rules unless he understood them and had been examined on the rules.

Q. But the rules with regard to protecting the train apply whether there is a cub on the job or not?

A. They apply to the members of the crew, the regular crew on that train. That is, engineer, fireman and conductor, and in the case of a freight train, to the brakemen.

By the Court:

Q. Well the cubs have to observe the same rules that apply to the regular crew, don't they?

A. Well, as far as they know them they would observe them. As far as the operating rules are concerned they wouldn't know them until they had been examined on them.

By Mr. Jansen:

Q. But for their own personal safety and for the safety of the other members of the crew, cubs have to observe the same rules with regard to safety as the other members of the crew?

A. Well, he would have to observe safety insofar as he knew what safety was but I wouldn't say that they observe them insofar as the rules require because they don't know the rules.

Q. If a man were cubbing and the flagman sent him back with the flag he would not be free to come and go or walk off and refuse to stay back there, would he?

A. I don't know just what sort of understanding he might have with the man that sent him back. The regular flagman has no right to send him back to protect the train. If he does he is just doing it of his own volition and without our consent or knowledge.

Q. Do you have certain instructions that you give employees with regard to training cubs?

A. No, nothing except a permit authorizing the cub to ride their train and tell them about the work, etc. and safety.

Q. And your permit, as you call it, tells the train crew not to permit the cub to indulge in any danger practices, does it not?

A. I don't know that it says that. I just wouldn't know. It may and may not.

Q. What you meant when you said the cub was not required to follow the rules was that if anyone was disciplined because of a violation of the rules the cub would not be included in the discipline. That is what you meant, isn't it?

A. Well, of course, we have got no control over cubs to make them comply with the rules or to administer discipline. They are just not members of the crew.

Q. You don't really answer my question. If something happens and a cub is on the crew, you don't discipline the cub, is that what you mean?

A. No, I don't discipline a cub.

Q. Would you hire him?

A. What do you mean, hire him?

Q. When he finishes his training?

A. Well, if he was needed.

Q. If he was responsible for what happened you would hire him?

A. I think so. I don't think that we would hold a cub responsible for something that the regular crew was charged with the responsibility for.

Q. Now, Mr. McWhorter, getting along this knowing the road, as a matter of fact, one of the real reasons for requiring a man to go through a cubbing period is so that he knows the road, knows the signals, knows the sidetracks, housetracks and so on?

A. Yes sir.

Q. That is one of the reasons and, as a matter of fact, if a man has been a regular employee for two years running between Nashville and Bruceton and you want him to run between Nashville and Chattanooga and he has never made the run before, you require him to cub, don't you?

A. And he has never been on that division?

Q. And you require him—

A. He would have to go there and learn the sidetracks, signals, stations, etc.

Q. And you require him to cub for at least one round trip?

A. Yes sir.

Q. And if a man comes from another railroad and he has learned signals and how to couple and uncouple cars, or how to fire an engine, and is an experienced fireman or brakeman or switchman, you still require him to cub your road, don't you?

A. Well, yes sir, he would have to cub it to learn the road. He may be an experienced fireman, brakeman or switchman on some other railroad but if he didn't know our railroad and didn't know the signals, stations, sidetracks, etc. and, so on, of course, he would have to cub just the same as if he had never worked for a railroad.

Q. He might have run as a fireman, he might have fired the same kind or kinds of engines on the other railroad, might he not?

A. He might have.

Q. He might be entirely familiar with firing?

A. Still he would have to know the road.

Q. I understand that but I mean as far as actually firing an engine is concerned, if he was a fireman, he might know all about it?

A. The proper firing of a locomotive depends upon a knowledge of the grades, curves, etc. of the railroad.

Q. In other words, if he came to work for your road, your Company, and had fired for another road for five or ten years, he would have to know where the hills were so that he could get up enough steam to get over them?

A. Yes sir.

Q. And he would have to know where the signals were on your road?

A. Yes sir.

Q. He would have to know all those things in regard to your road, its topography, the layout of switches and all of that?

A. Yes sir.

Q. And that is why he would have to cub?

A. Yes sir, and also to familiarize himself with our working conditions and rules, and while practically all railroads have a standard set of rules, they vary in some things due to the local conditions.

Q. And the same is true of a brakeman or switchman?

A. Yes sir.

Q. Now, you have had occasions at times within your knowledge when you have had a man cubbing for brakeman or for fireman where you put him to work because of an emergency and had him fire an engine between one point and another or had him act as actual brakeman between one point and another while he was cubbing, haven't you?

A. I think there have been a few instances of that sort but he was paid the full wage of the regular brakeman or fireman, whichever the case might be.

Q. And the next day he went back to cubbing again if he hadn't completed it?

A. Well, he might have. I just don't know.

Q. Now, do you have the written instructions that you gave to your superintendents about the payment of office help back at the time when the Wage and Hour Act became effective?

A. No. As I said awhile ago, when the Act first became effective we were not putting on any students. That is, you are talking about porters, clerks, stenographers, callers, etc., and all instructions issued with respect to posters for positions of that sort were oral. I haven't any written instructions in my file but it is evidence to me that it was understood because, as I said awhile ago, they would write in occasionally asking for authority to put a student on.

Q. Do you recall any specific time when you gave any oral instructions to your superintendents about the payment of students for office help, for office work?

A. No, I can't recall any specific dates, we have talked so much about those things.

Q. Do you recall that you did have those oral instructions?

A. I am sure I did for the reason, as I say, that they would write me asking for authority to put on a student; otherwise, they wouldn't have known that.

Q. Did they ever write you from Chattanooga asking for authority to put on a student?

A. Yes sir.

Q. Even before—

A. Yes sir.

Q. So you assume that because they asked for authority to put a student on—

A. We have a form known as Form 983 that is submitted to the General Manager by the superintendent seeking authority to put on not only students but any employee and I have several instances where the superintendent of the Chattanooga Division has written me, sending in one of these forms for Murfreesboro, Tullahoma and places where he felt that he would need additional clerks or messengers, and he wanted to put them on and train them. I have a number of such requests in my file in the office.

Q. What was said about paying them?

A. Well, the forms specify the hourly rate and they were instructed that they could put them on and pay them the hourly rate provided for by the Act.

Q. Then for any man who is put on as a student at any one of these places the superintendent would first have to ask for permission?

A. Yes sir.

Q. And then you would give him permission and instruct him to pay him at the hourly rate?

A. Well, if I felt that he needed or would need additional employees of that kind, I would approve the form authorizing him to put the student on.

Q. Well, with regard to all these employes on the Chattanooga Division did you, in each instance, instruct them to pay them the hourly rate?

A. Every time, and they would send the Form 983. The superintendent's office does.

Q. Was it your contention that they didn't send the form with regard to all these people who were not paid?

A. In Chattanooga?

Q. Yes sir.

A. That is true until after this lawsuit was filed.

Q. So you didn't have any hard and fast rule requiring them to ask permission?

A. Oh yes, yes sir. They have no authority to put anybody on the payroll without an approved form, which must not be approved by me but by the president.

Q. How do you account for that Chattanooga situation?

A. Just a mistake is all. Just somebody overlooked something.

Q. You mean they didn't put them on the payroll and, therefore, they didn't have to ask for your permission?

A. Well, they didn't ask and they should have asked.

Q. Well, as long as they didn't put them on the payroll they didn't have to ask for your permission?

A. They had no right to put them on without authority from me, yes sir.

Q. You say as far as you know the Cravens Yards is the only place where this happened?

A. As far as I know. There may have been others, and if they have come to my attention, they have been paid.

Q. Have all the people in the Cravens Yards been paid?

A. As far as I know.

Q. Did you have any occasion to check it?

A. I have authorized that they be paid.

Recross Examination,

By Mr. Whitwell:

Q. Just two or three other questions. Something was said—I believe you said that on some few occasions a person who was on a train as a cub would take the place of a regular employee for the remainder of that run. Now, would that be a case of emergency, for example, such as where the regular brakeman got sick and had to get off or the regular fireman had to get off and the man who was on there cubbing would finish that run. Is that what you had reference to?

A. That is the situation exactly. It would only be done in cases of emergency.

Q. In such cases as that, I believe you said, for that trip or whatever he did in the regular man's job he was paid the regular contractual rate applicable to that job?

A. That is right.

Q. Is that understood by the representatives of the

trainmen's organization and approved by them in these emergency cases?

A. I think it is, yes.

Q. Now if a train were to leave a terminal such as Nashville and a regular brakeman were called and for some reason he did not show up, would he be replaced by a cub or would you call another man on the list next out, a regular man to take his place?

A. Well, the next man out, that is, on the extra list. The first man out on the extra list under those conditions would be called to fill that vacancy.

Q. And out on the line of road in a case of emergency such as you speak of, if the fireman had to get off by reason of being sick and if there were a regular fireman, employee, riding on that train, dead-heading, would he be called instead of the cub?

A. Oh yes, we would use him instead of the cub, or if it is at a station where the regular man might get sick and have to be relieved.

Q. Now, just a question about this extra man or more than a two-man ground crew in switching operations, I believe you stated that so far as you know Mr. Hall's statement there might have referred to hump crews.

A. That would be my guess. It would be a guess only.

The Court: What are you talking about, the president's statement?

Mr. Whitwell: Yes, sir.

The Court: He is not on the stand.

By Mr. Whitwell:

Q. Now, Mr. McWhorter, if you had a situation where more than two switchmen were needed would the third man be drawn from the list of regular employees?

A. Yes sir.

Q. He wouldn't be a cub then, would he?

A. If he were a regular member of the crew he would get on the job by bidding in the place, which he filled, and if he is not a regular member he would be called from the regular extra board of regular employees.

Q. Just one question about the rule proposition. If a

rule is violated, an operating rule is violated, is it some member of the crew that is held responsible for the violation of that rule and not the cub?

A. Yes, some member or probably all members might be involved, that is, the regular crew but not the cub.

Q. And the cub has no duty or responsibility in reference to seeing that rules or operation of the train are observed?

A. None whatsoever.

Q. And is not held accountable by way of discipline or otherwise for any violation of an operating rule in connection with train operation, is that right?

A. That is right.

Further this witness saith not.

(Recess.)

The next witness, JOHN HENRY CHILDERS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is John Henry Childers?

A. Yes sir.

Q. How old are you?

A. Forty six.

Q. Where do you live?

A. Chattanooga, Tennessee.

Q. How are you now employed?

A. The NC&StL Railway.

Q. How long have you been employed by that Railroad?

A. I believe it was in November, if I am not mistaken, when I went on a regular job.

Q. What kind of a job do you have with the Railroad?

A. I am utility clerk.

Q. Have you been utility clerk all the time that you have been on regular?

A. No, I was yard clerk for, I would say, about three months.

Q. Now, Mr. Childers, before you went on regular did you have to go through a cubbing or posting period?

A. Yes sir.

Q. Do you recall when you went to apply for a job with the NC&StL Railway?

A. Well, it was the latter part of February in 1944.

Q. What had you been doing before that time?

A. I had been working at a textile plant, at Koosa Thather.

Q. What general experience had you had? Had you had any office experience before going to apply for a job with the Railroad?

A. Yes sir. Not in that line, but I had worked in an office off and on for, I guess, for twelve or fifteen years, you know, just in and out.

Q. What kind of office work?

A. Shipping.

Q. Now, do you recall going to the NC&StL and applying for a job?

A. Yes sir.

Q. Do you recall the date?

A. I don't recall just the date, but it was in February, though, the latter part of February, around the 17th or 18th.

Q. Of February, 1944?

A. Yes sir.

Q. When was it you went on regular?

A. I believe it was in November, 1944.

Q. Now, who did you talk to at the Railroad when you applied for a job?

A. Mr.—

The Court: Now, Counsel, isn't it just a question of whether he is being paid in accordance with the Wage and Hour Act? Isn't that all there is to this?

Mr. Jansen: Yes sir, but if it please the Court, I think the Court should have a full and complete picture.

The Court: I don't think it concerns me as to who he talked to down there. The question is: is the Wage and Hour Law being complied with. That is all. Just ask him the pay he gets.

Mr. Jansen: Do I understand that the Court objects to my asking the witness the circumstances of his employment?

The Court: I think your last question is entirely immaterial, and I am saying for your general guidance and information that the question here is, the issue is, whether or not this man is receiving pay in accordance with the Wage and Hour Act, and that is all there is to it.

Mr. Jansen: Note an exception.

The Court: And you need not bother with noting any individual exceptions. In my court you have an automatic exception to every adverse ruling.

Mr. Jansen: Thank you.

The Court: All right; go ahead.

By Mr. Jansen:

Q. When did you first start drawing pay from the NC&StL Railway?

A. I couldn't say positive but I began working some the first part of March, around the 4th or 5th of March, I believe, was the first day that I worked.

Q. Now, you said you went through a cubbing or posting period.

A. Yes sir.

Q. Will you tell us what you had to do and how you did that?

A. On different jobs I would cub on I would stand around and watch the man on the job and after I began to get a little acquainted with it I would do a little work along. In other words, the regular man would be doing something there that he could turn some of it loose to me, you know, and I helped him a little. I mean in order to learn it, you know.

Q. Did you cub—

By the Court:

Q. You are an office employee, are you?

A. Yes sir, that is right.

The Court: All right, go ahead.

By Mr. Jansen:

Q. Did you cub or post more than one job?

A. Well, yes sir.

Q. How many different jobs?

A. Two or probably three a little. A little on three, I believe.

Q. Three different jobs?

A. Yes sir.

Q. Which jobs were those?

A. Well, train clerk and yard clerk and it seems like a day or two on the record job.

Q. Recording, the record job?

A. That is right.

Q. Now, how long did you post or cub on the yard clerk job?

A. Well, I didn't cub so much. I think probably two or three days.

Q. Was that the first job that you posted on?

A. No sir, the train clerk job was the first one.

Q. Let's take the train clerk job—how long did you cub or post on that job?

A. Well, I didn't keep any record of it but I believe it was five or six days.

Q. Five or six days?

A. Yes sir, maybe seven, five or six or seven days, something like that.

Q. Something like that?

Q. Were those six consecutive days?

A. Yes sir, I believe they were. I might have missed one, maybe one day.

Q. How many hours a day did you post on that job?

A. Well, as a general rule I would come in for eight hours and one or two of the days I might have stayed ten in order to get some experience, you know, and understand it.

Q. Well, will you explain a little more about how you happened to stay ten hours?

A. Well, you see, as a crew would change—sometimes it wouldn't be so busy and then, you know, maybe the next man that came on, he could explain to me and help me out

some, you see, and I would stay with him probably an hour or so.

Q. What kind of work does a train clerk do?

A. Well, he just writes up bills, you know, on a train sheet, itemizes it on the train sheet for the train to go out.

Q. You mean he itemizes the bills covering various shipments included in that particular train?

A. That is right.

Q. What else does he do?

A. Well, he works that train out but like when the bills come in, why, he has to cut out the cars, you know, that comes out from Chattanooga and shoot those on through that go on through. Like they are coming out of Nashville and going toward Atlanta, of course, the Chattanooga cars are cut out there and he works those out and transfers them, makes transfer to their destination wherever they go.

Q. When did you start filling out these train sheets, the first day you posted?

A. No, I wasn't familiar enough with them for two or three days to do that.

Q. How long after you first started posting did you start filling out these train sheets?

A. Well, it seems like I wrote on some maybe the third or fourth day I was there.

Q. And from then on did you every day fill out train sheets?

A. Yes, in and out some.

Q. And followed through the routine?

A. Yes sir.

Q. You did some of the work and the regular man did some?

A. Yes sir, when he would have time to let me sit down there.

By the Court:

Q. Just a minute. What did you say your name was?

A. Childers, J. H.

Q. When did you go on the NC&StL Railway payroll as a regular employee?

A. If I am not mistaken, it was in November.

Q. November, 1944?

A. Yes sir.

Q. Now, prior to that time you were posting, a trainee, while you were in training?

A. Well, yes sir, I worked as an extra man.

Q. Well, before you qualified, before you went on the regular payroll?

A. Oh, on the regular payroll?

Q. Yes. When did you go on the regular payroll as a regular employee?

A. Well, I don't know exactly when I went on the regular payroll.

Q. Well, during this training period that you put in then, did you get any pay for that?

A. Yes sir, I think I worked some about March 4th or 5th.

Q. Well, at what rate were you paid for this training work?

A. What rate?

Q. Yes, how much pay did you get for that training work?

A. Well, whatever that job paid, you know. It was around pretty close to $7.00 a day.

Q. For how many hours?

A. Eight hours.

Q. Well, that would be $7.00 a day for eight hours would be about eighty cents an hour, wouldn't it?

A. Yes sir, it run around 87 cents an hour.

Q. All right, did you get that pay during all that training period?

A. Yes, when I would be working the job.

Q. In other words, was there any time when you were training down there that you didn't get paid for?

A. No, when I was working, that is, in other words, working the job I got that rate of pay.

Q. You got that rate of pay all the time?

Mr. Jansen: Let me explain, if the Court please. I think the Court has gotten the wrong impression.

Q. While you were training you put in a couple of days as regular man, is that right?

A. That is right.

Q. And that is what you were paid $7.00 a day for, is that right?

A. Yes sir. You see, you don't have to be a regular man. If you are just an extra man you draw just as much as that regular man does.

Q. When you are on a regular job?

A. When you are on a regular job.

Q. Filling in for the regular man?

A. That is right.

Q. But you didn't fill in for the regular man through this whole period of training, through the posting period?

A. No. To make you thoroughly understand it, like a man would be out today and I got to work, like the first day I worked there was a man out and I worked after I had cubbed eight or nine days.

The Court: That is not what we are talking about. I told you a while ago when you were in training down there or posting—is that what you call it, Counsel?

Mr. Jansen: Yes sir.

The Court: Is that what your understanding of it was?

Mr. Jansen: Yes sir.

By the Court:

Q. When you were posting, in training, going around with somebody else learning the job did you get any pay for that time?

A. Oh, no sir, I didn't get any pay for that until I worked on the job.

Q. You didn't get any pay until you worked on the job?

A. That is right.

Q. Well then, you got pay from then on?

A. I didn't get any pay at that time. That was the understanding. I was supposed to learn the job.

Q. When you were learning the job did you get pay or not, for the time you put in when you were going around

with somebody else learning the job—did you get any pay for that?

A. No sir, not at that time. I did later on.

Q. What do you mean by "later on"? That they sent you a check to cover that time?

A. Yes sir.

Q. Then you have been compensated for that, have you?

A. Yes sir.

Q. At the time you did it they were not paying but later on they sent you a check to cover it?

A. Yes sir.

Q. And at this same rate of 87 cents an hour?

A. No, it was paid for at about the rate of 40 cents an hour, I believe it was.

Q. But the Wage and Hour scale?

A. Yes sir.

The Court: All right.

By Mr. Jansen:

Q. Do you know whether you got paid for all the hours you spent posting?

A. Well, no, I couldn't say. I don't know for sure that I did.

Q. Do you have any way of knowing whether you got paid for all the hours you spent posting?

A. As long as I didn't keep any record I couldn't say.

Q. How much did you get?

A. Well, my check was $28.80.

Q. Did that show what the face amount of it was? There were certain deductions on that check, weren't there?

A. Yes sir, that was the total amount, $28.80.

Q. That was the total amount of the pay that they gave you for the time that you were posting?

A. Yes sir.

Q. Now, can you tell us—you say you spent six or seven days posting for yard clerk?

A. Train clerk.

Q. And how many hours a day?

A. Eight hours a day.

Q. Oh, not all of those days were ten hour days?

A. Well, some. There was one or two of those days ten hour days, about ten hour days.

Q. And then how many days did you post for yard clerk?

A. Well, I would say two days, maybe two days, maybe a little over, not much over two days.

Q. How many days did you post for the third job, record clerk?

A. Well, I worked, all-told, about fourteen hours on the record job.

Q. Fourteen hours?

A. Yes sir.

Q. And the two days you spent on the yard clerk job, how many houre a day was that?

A. Eight hours.

Q. Did they give you any explanation with the check that they gave you for $28.00?

A. Yes sir, they said that was a check for my cubbing when I first came there.

Q. Did they explain the number of hours that that covered?

A. Well, I don't believe so.

Q. How long after you had done your cubbing did they give you that check?

A. It was sometime the first of this year.

Q. The first of 1945?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Childers, just two or three questions. If I understood you correctly, you did this posting at Chattanooga, Tennesee?

A. That is right.

Q. Now, if I understood you correctly, the first posting that you did was for the position as yard clerk over there in Chattanooga?

A. No, train clerk.

Q. And you think you posted maybe five or six days for that?

A. Yes sir, maybe seven. It would run around six or seven days.

Q. But you are not certain; you have no record to show definitely?

A. No, I didn't keep any record and I don't know positively.

Q. And then after completing your posting for that you were employed as extra man for the job of train clerk?

A. Yes sir, sometime. I expect I had been there something like three weeks before I began to work pretty regular.

Q. Then you posted, I believe you said, a period of something about two days for the position as yard clerk?

A. Yes sir.

Q. And you posted a few hours, I believe you said about fourteen hours for the position as record clerk?

A. Yes sir.

Q. And these periods of posting were with a view of your having a position, one kind for one kind of clerk and another for another kind of clerk and another was still a third kind of clerk?

A. That is right.

Q. And back at that time that you did that posting you were not paid but you were paid somewhere around the first of this year for the days and time that you spent posting for these different positions, is that right?

A. Yes sir.

By the Court:

Q. You say that that pay was at the rate of 40 cents an hour?

A. Yes sir, it figures about the rate of 40 cents an hour.

Further this witness saith not.

Testimony of Curtis Bomar

The next witness, CURTIS BOMAR, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Curtis Bomar?
A. Yes sir.
Q. How old are you?
A. Thirty-six.
Q. Where do you live?
A. Fayetteville, Tennessee.
Q. Are you now employed? How are you employed?
A. As agency clerk.
Q. With whom?
A. The NC&StL Railway.
Q. Are you employed at Fayetteville?
A. No, sir.
Q. Where are you employed?
A. Murfreesboro, Tennessee.
Q. How long have you been employed as agency clerk for the NC&StL Railway?
A. About seventeen months.
Q. About seventeen months?
A. Approximately, yes, sir.
Q. And before you were employed as agency clerk with the NC&StL Railway were you required to do any period of posting?
A. Yes, sir.
Q. And where was that?
A. At Fayetteville.
Q. Were you working at the time?
A. Yes, sir, I was employed—I had been employed by another company.
Q. What company was that?
A. Elk Cotton Mill.
Q. Had you ever had any office experience before going with the NC&StL Railway?
A. Yes, sir.
Q. Will you explain what that was?

A. I was bookkeeper in the First National Bank in Chattanooga.

Q. Any other?

A. And bookkeeper for a motor company.

Q. Do you remember the name of the company?

A. Smith Motor Company.

Q. Where was that located?

A. Fayetteville. They were at that time.

Q. Now, how many hours a day did you put in this time posting at the NC&StL Railway?

A. Well now, I was very irregular on that. When I applied for a position it was—I was told I had to post and I could post at my convenience, at any hours that I wished to, so I did, and sometimes I would come to work around 9:00 o'clock of a morning or 9:30 and work until about 1:00 or 2:00.

Q. Did you do that every day?

A. Well, five days a week.

Q. Five days a week?

A. Yes, sir.

Q. And who was your superior there?

A. Mr. Dave Buchanan, the agent.

Q. And is that located anywhere near the Cravens Yards?

A. No.

Q. And for how many weeks did you continue to post from around 9:00 o'clock in the morning until 1:00 o'clock in the afternoon five days a week?

A. Well now, I couldn't say exactly because I didn't keep any record of it.

Q. Well, do you have a recollection of it, approximately?

A. I began in August, around the first of August and until around the middle of October.

Q. Did you ever receive any pay for that posting period?

A. No, sir.

Q. Have you ever to now received any pay for it?

A. No, sir.

Q. Now, what kind of work did you do when you were posting?

A. Well, it was billing and expensing and checking freight.

Q. Well, explain this billing a little bit. Tell us how you did that.

A. It is billing out the shipments to the destination, the route and the rate, amount of freight.

Q. Did you do that work yourself?

A. Yes, sir.

Q. While you were posting?

A. Yes, sir.

Q. Did someone help you with it?

A. Yes, sir.

Q. Who was that?

A. The operator-clerk; he showed me.

Q. Did he do some of the billing too?

A. Yes, sir.

Q. Now, what is this checking you spoke about?

A. That is checking freight from the boxcar, freight designated for this station.

Q. How did you do that?

A. Well, we check that from the waybills.

Q. Where did you go to do that?

A. You go to the freight car.

Q. Did you have the waybill with you?

A. You have to have the waybill with you to check this off and tell the porter the number of pieces that you want out of this car for this station.

Q. Who carries it out?

A. The porter.

Q. You check it off and tell him what to take out and he takes it out?

A. Yes, sir.

Q. Did you do that all during this time you were posting?

A. I helped do it.

Q. Did anyone else do it?

A. Yes, sir.

Q. At the same time you were doing it?

A. No, sir.

Q. You would do it one time and somebody else do it the next time?

A. No, to start off with the operator gave me an outline of it and then I caught on to the work. I went on then a while and went to doing some more work.

Q. How long did it take you to learn the outline of it and how to do it?

A. Well, I am still learning.

Q. I know, but before you did it yourself?

A. You mean did all of that particular job?

Q. Checking, yes sir.

A. Well, I will say two mornings that I was there, in the morning, and I would say I started on the third morning.

Q. From then on you did the checking more or less by yourself?

A. Off and on, yes sir, not regular.

Q. I understand. What else did you do beside billing and checking?

A. Making expense bills for the freight that came in for the customers.

Q. Did you do that by yourself during this posting period?

A. Some of it I did, yes sir.

Q. Off and on as the posting period went on?

A. This man though, he would tell me. If I got something that came in that I didn't know anything about he would tell me—I would stop and ask him what to do and he would tell me.

Q. I assume there are times you do that even now?

A. Yes, sir.

By the Court:

Q. Well, was anybody else there regularly to perform all those duties you were allowed to perform?

A. Yes sir.

Q. There was a regular man to carry on those duties?

A. Yes sir.

Q. And you were learning to take his place, I suppose?

A. By helping him, yes sir, or he was helping me, rather.

Mr. Jansen:

Q. Is that the same kind of work you are doing now?

A. Yes sir, the same work.

Q. What difference is there, if any, between what you do now and what you did when you were posting?

A. Well, practically nothing; practically no difference but naturally I am more efficient now than I was when I began.

Q. And you became more efficient as time has gone on?

A. I know more what I am doing now. Back then I was just blind. I didn't know what I was doing.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Bomar, I believe you stated that you posted or trained there at Fayetteville irregularly for the job that you were seeking to learn, the position that you were seeking to learn so that you could later become an employee?

A. Yes sir.

Q. You understood when you went down there to post and train that you were training for your own benefit to learn a job that paid good wages, didn't you?

A. Yes sir.

Q. You were doing that for your own benefit, weren't you?

A. Yes sir.

Q. There was a regular man you call the operator-clerk there, who was regularly employed and paid to do everything that you did in furtherance of your learning the duties of the job that you wanted?

A. That is right.

Q. And a lot of the time, I take it, in learning that you were more or less in the way; you had to be instructed by him and told a lot of different things?

A. That is right.

Q. Is that true?

A. Yes sir.

Q. And I assume that this regular employee there was very nice to you and he took time off, especially in the beginning, to teach you how to check bills and do the different things that you just related to Mr. Jansen?

A. That is right.

Q. And during that time that he was training and teaching you it was at least slowing him up, wasn't it?

A. Yes sir, I would think so.

Q. You didn't consider that the Railroad gained any benefit by what you may have done there while you were learning to do the job that you later wanted, did you?

A. I couldn't see how they could.

Q. Were you employed anywhere else? I believe you say you were bookkeeper for one or two concerns?

A. Yes sir. No, at that time I was employed at a textile mill but this was later, I mean, over there back than the present time.

Q. What year was it when you took this training there under this regular man?

A. You mean posting for this railroad job?

Q. That is right.

A. That was in 1943.

Q. During the time that you were posting there irregularly, you say, did you have a job elsewhere?

A. Yes sir.

The Court: He worked for the cotton mill.

Mr. Whitwell: I thought I understood him but I was afraid I didn't.

Q. And then during your time off from your regular job you would come over there and post at your leisure?

A. Yes sir.

Q. And came when you desired?

A. Yes, sir.

Q. And left when you desired?

A. That is right.

Q. You might post some days two hours and some days you might post five?

A. No, as a general rule when I came on I worked fairly regular hours.

Q. Of course, you understood that you were not employed at that time?

A. Yes, sir.

Q. And it was more or less left up to you to decide when you had learned the job to your satisfaction?

A. No, it wasn't left up to me to know when I had learned the job.

Q. Do you know now, Mr. Bomar, how many hours or how many days you posted over that period?

A. No, I haven't any idea. As I said before, I didn't keep any record. I know approximately. I guess I could give it to you by figuring it up, sitting down and taking the calendar and figuring it up. That would be the only way.

Q. Do you know whether or not, Mr. Bomar, any voucher has been recently issued to cover such time as you spent there posting?

A. No, sir, I don't know of any, if it has.

Q. If that can be ascertained and a voucher issued to cover the period while you were posting there at the rate of at least forty cents an hour, will that satisfy you all right?

A. There is no question of satisfying me because it was a trade to start off with. There was no question on that.

Q. Just you were there training and learning?

A. Yes, sir.

Q. And weren't thinking about money while training?

A. That is right. It was a benefit to me on account of the future job or position.

Q. Now, after that you did get employed. I believe you say you are now employed as clerk at Murfreesboro?

A. That is right.

Q. What is your rate of pay?

A. $161.00 and some few cents a month.

Q. For how long have you been drawing that or some similar rate of pay?

A. December 14th—from December 14th, 1943.

Q. Now, I am not sure that I followed you. After you completed your training period there at Fayetteville did you have a job as clerk somewhere else with the Railway before you went to Murfreesboro?

A. Yes, sir.

Q. Where was that?

A. Well, now, there were two or three different places on the line. You see I was an extra man. I was on the extra board, extra clerk. I was first employed at Sherwood.

Q. Where you would be switched to would be according to where you stand on the roster, the seniority roster and be called?

A. No, sir, where I might be needed. You see, I understood at that time I was the only man on the extra board.

Q. Now, at these different places was your rate of pay comparable with what you are getting at Murfreesboro?

A. Yes, sir, it was the rate of pay for that job or that position, either one you call it.

Q. Will you undertake to estimate and figure out as best you can the time that you actually put in there at Fayetteville for this job and give it to me?

A. Well, I couldn't say off-handed because I don't know the number of days. You see, there are some Saturdays I worked there, just depending on the job, I mean how much work was in the office. I always came down on Saturday to get experience.

Q. Will you assist the accounting department, if it happens to not have an accurate record of your time you spent, assist them and aid them in working up the exact time?

A. Yes, sir, I will do everything I can.

Mr. Whitwell: Thank you, sir.

Redirect Examination,

By Mr. Jansen:

Q. Where was it you worked on the extra board?

A. Sherwood and Cowan.

Q. And when did you do that? Before you went in the army or after?

A. Well, this was after I had been turned down for service.

Q. Or before you went up for your physical examination?

A. Yes, sir.

Q. Was anything said to you while you were posting about when you were going to get to work?

A. No, sir, not off-handed.

Q. Did you ever ask anybody about it?

A. Well, the agent and I discussed it and he said that he had wrote to the chief dispatcher about it but hadn't heard anything.

Q. How long after you had started posting was that?
A. Approximately about three or four weeks.
Q. Approximately three or four weeks?
A. Yes, sir.
Q. And he had written to the chief dispatcher, you say?
A. Well, that is the impression that I received.
Q. Did he tell the man you were working under?
A. I just couldn't say but that was the impression that I got, that he did.
Q. You say you talked with him?
A. I talked with the agent.
Q. Talked with him perhaps more than once about it?
A. Yes, sir.
Q. And he gave you the very definite impression after about three or four weeks that he had written to the chief dispatcher, is that right?
A. Yes sir.
Q. How long after did you continue to post, after that time?
A. Well, it was sometime the first or around the first of October that I was offered a job with the NC&StL Railway, now, a regular job.
Q. What date would it be with reference to the three weeks after when the dispatcher said he had written in; when would that be?
A. Well, it was after the first of October. I couldn't say when.
Q. Now, when the dispatcher had written what did you do?
A. What do you mean, written in?
Q. And when you talked with the dispatcher?
A. I haven't talked to the dispatcher.
Q. With the Company?
A. With the Company, you mean?
Q. Yes sir.
A. Will you repeat that question?

The Court: You have gotten him where he don't know where he is going.

Mr. Jansen: I am afraid so.

Q. You say you talked with the agent and he said he wrote the dispatcher?

A. Yes sir.

Q. What month was that?

A. Along in the latter part of August or the first of September.

Q. And you heard nothing further until October?

A. Yes sir.

Q. And then you were offered a job.

A. Yes sir.

Q. And during the time after the agent had said he had written to the dispatcher you continued to post on every day?

A. Every week day.

Q. And that was five days a week?

A. Yes sir.

Q. In fact, during the whole posting period it was five days a week?

A. Well, now there was some Saturdays I spliced in. I don't know exactly how many because, as I said awhile ago, I didn't keep any record and I have no way of knowing but I did work some Saturdays.

Q. You mean in addition to five days you worked on Saturday also?

A. Yes sir.

Q. A few times?

A. Yes sir.

Q. Were your hours at the mill regular?

A. Yes sir.

Q. What time did you start there?

A. 3:00 o'clock.

By the Court:

Q. When did you go on as a regular employee?

A. You mean with the Railroad?

Q. Yes sir.

A. It was December 14th, 1943.

By Mr. Jansen:

Q. Now, when you were offered this job in October, did you take it?

A. I tried to.

Q. And what happened?

A. My employer at that time didn't want to release me.

Q. Did you continue posting then?

A. Off and on. It became more irregular after that.

Q. From the first of October the posting was more irregular?

A. Yes sir.

Q. Have you ever been paid for any of that time?

A. No sir.

By Mr. Whitwell:

Q. Mr. Bomar, you don't think you posted too long, do you?

A. No sir, I don't.

Thereupon a recess was taken to 1:30 for lunch.

Afternoon Session.

CURTIS BOMAR recalled for further examination, testified as follows:

By Mr. Jansen:

Q. Mr. Bomar, at my request did you figure up the hours that you spent cubbing without pay for the NC&StL Railway?

A. You mean—

Q. During the noon recess?

A. I tried to, as best I could, figure it up.

Q. As best you could remember. To the best of your recollection do you have the total number of hours that you spent cubbing?

A. Yes sir.

Q. And what is the total number of hours?

A. Well, roughly speaking, it is 320 hours. I am not positive of it, that that is right.

Q. Well, have you got it divided in any way?

A. Yes sir, the best I could.

Q. Well, explain how you arrived at that 320 hours. I notice you have a piece of paper in your hand and I find figures on it starting with 90.

A. Well, during August the first three weeks that I worked I figured five hours a day, six days a week and

that would be, of course, 30 hours and three times 30 is 90.

Q. Then next.

A. The next week would be, I figured, 25 hours a week.

Q. How many days would be involved in that?

A. Five days.

Q. Not Saturday?

A. Yes, sir, as best I can remember.

Q. Go ahead.

A. And two weeks would be 50, and then the next two weeks 60. 30 hours a week for those two weeks—it would be 60.

Q. What is the difference between this two and the previous two?

A. Well, there was something came up there, I suppose, I wanted to learn.

Q. I mean was there another day involved?

A. Well, Saturdays involved in that.

Q. Those two weeks included Saturdays?

A. Yes, sir.

Q. All right.

A. Then the next two doesn't include Saturdays and would be 50 hours. And then that was at the point, as well as I remember, that I was offered a regular job, and the next two was 20 hours per week, apiece, which would be 40 for the two weeks, and then just roughly speaking for the rest of the time up in November was 70 hours, making a total of 320 hours.

Q. And up to now you haven't been paid for any of that?

A. No, sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Bomar, just two or three questions. Of course, you don't pretend that these figures you give here are accurate at all?

A. That is right.

Q. They are just collected more or less from memory?

A. That is right.

Q. I believe you stated this morning that in October,

1943 you were offered a job and the company with whom you were employed at that time wouldn't release you.

A. That is right.

Q. And you couldn't accept this railroad job at that time?

A. That is right.

Q. Now, you went ahead, since you couldn't accept the job at that time, you went ahead for your own benefit and on your own accord and posted or trained on from time to time up until the time there was a job open for you and you accepted it in December, 1943?

A. Yes sir. Well, the reason of this space in there, I was called to the army for a physical and I could have begun sooner than December 14th if I wasn't expecting the army to call me and I didn't want to begin working and then have to quit.

Q. But it wasn't any fault of the Company that you didn't get to work earlier?

A. No sir.

Q. Now, before October 18th, 1943 wasn't it your understanding that there wasn't any job open; that the jobs were filled and, therefore, you posted on, trained on, and there was no job open for you, and that you wanted to keep running along until such time as there would be a job open for you?

A. That is right.

By Mr. Jansen:

Q. Mr. Bomar, do I understand that the reason you kept cubbing was because they had no job open for you?

A. Well, at that time I wasn't offered one, now, from August up until October. That is the reason I continued to cub on.

Q. Who told you there was no job open for you?

A. Well, no one. I wasn't offered one. From that I just assumed there wasn't one.

Q. Was that some of the things you and the agent talked about?

A. I don't know. I couldn't say definitely. I suppose so. I don't remember, recall any things to that effect.

Further this witness saith not.

The next witness, CHAS. L. ROSENHIEM, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Charles L. Rosenhiem?
A. Yes sir.
Q. How old are you?
A. Forty six.
Q. Where do you live?
A. Chattanooga, Tennessee.
Q. How long have you been living there?
A. About forty six years.
Q. How are you employed?
A. Pharmacist.
Q. How long have you been a pharmacist?
A. About twenty years, I guess.
Q. Are you a graduate of a pharmacy school?
A. Yes sir.
Q. Were you ever employed by The NC&StL Railway?
A. Yes sir, I was.
Q. When was that?
A. I worked nine days for pay about May 20th, I think, last year.
Q. Nine days for pay?
A. Yes.
Q. Did you work any days without pay?
A. About six to eight weeks. I don't remember the exact date on that.
Q. Have you ever been paid for those six to eight weeks?
A. You mean cubbing?
Q. Yes sir.
A. Not yet.
Q. Now, tell us what kind of job it was that you cubbed for?
A. Well, I was cubbing for train clerk, record clerk and yard clerk.
Q. Three different jobs?
A. Any one I might qualify for.

Q. Did you cub for the three different jobs at the same time?

A. I cubbed ninety percent of the time for record clerk because I found out I couldn't qualify for the other two.

By the Court:

Q. They usually call that posting, don't they?

A. Record clerk is posting records, I guess you might call it.

By Mr. Jansen:

Q. Cubbing is also referred to as posting, is that correct?

A. I don't know.

The Court: I think office employees are called posting and the yard employees or road employees call it cubbing, is that right?

Mr. Jansen:

Well, that was my understanding but apparently—

Q. Did you have any understanding about that?

A. Cub is what they called me until I got a job as record clerk.

Mr. Whitwell: My understanding is that persons training for these clerical jobs are referred to as posters. Persons training for train service work are called cubs.

By Mr. Jansen:

Q. They called you a cub?

A. Yes sir.

Q. You were posting for an office job?

A. I tried to get an office job.

Q. I think the last question I asked you about your posting was whether you posted for all three jobs at one time?

A. No, I worked individually on each one.

Q. How came you to start doing this posting?

A. Well, I tried for the train job but I wasn't capable of typing, you see, good enough so I just gave that up. I saw I couldn't type with speed.

Q. What kind of job was that?

A. Train clerk. That requires you to type, you see, and I was kinder slow on the typewriter so I gave that up after two or three days.

Q. And then after two or three days did you talk to anybody about giving it up?

A. No, it wasn't necessary to talk to anybody. I saw I could cub any of the three jobs I liked.

Q. Who had told you that?

A. Mr. Born.

Q. Had you talked with him before you started cubbing?

A. Naturally. He gave me the place.

Q. Was it with Mr. Born that you filed an application?

A. Yes sir.

Q. Did you have to take some kind of examination?

A. No.

Q. Physical examination?

A. No.

Q. After you filed your application with Mr. Born did he tell you what to do?

A. He told me I would have to cub a certain length of time. He told me ten or fifteen days, and I would be placed somewhere.

Q. Who is Mr. Born?

A. I don't know what his title is but he is supervisor, I guess, of the Cravens Yards, I don't know what his title is.

Q. And you say he told you you would have to cub about fifteen days?

A. I would more than likely be appointed in fifteen days to some place if I was capable.

Q. Did he tell you when to come in the morning or during the day?

A. During the period of time he told me if I wanted to, work three of the shifts so I could get the experience on each job.

Q. Can you remember when the shifts started?

A. No, I don't remember the hours. One was in the morning early, another one was in the afternoon and evening and another one was at midnight.

Q. How long was each shift?

A. Eight hours.

Q. Mr. Born had told you he wanted you to work on each one of those shifts?

A. At various times. He told me he wanted me to learn each shift. He said work at different times and not just in the daytime.

Q. Now, you said you had to cub for yard clerk three days?

A. No, train clerk.

Q. I am sorry—for about three days?

A. Yes sir.

Q. Do you remember whether you cubbed different shifts?

A. No, just in the morning for train clerk.

Q. Were you there a full eight hours?

A. I don't know; I think so.

Q. And then what was next?

A. Yard clerk.

Q. How long did you post or cub for that?

A. That is outside work and I liked the inside work better so I gave that up and tried for record clerk.

Q. How long were you posting for yard clerk?

A. You don't post for yard clerk. You go around and check trains.

Q. How long did you cub for yard clerk then?

A. I don't know. It must have been a week maybe, or so; I don't know.

Q. Then did you work on different shifts when you were cubbing for yard clerk?

A. I worked the evening shift and the morning shift.

Q. How many hours a day?

A. Eight hours.

Q. Who told you when to come and when to go?

A. No one told me when to come and go. Mr. Born just told me just pick the shift, so I spent eight hours there.

Q. He had told you which shift to take?

A. He didn't seem to care what shift I took and I preferred to take the morning shift.

Q. Now, then, from yard clerk what was the next job you cubbed for?

A. Record clerk.

Q. Was that inside work?

A. That was inside.

Q. How long did you cub for record clerk?

A. Well, it must have been about four or five weeks.

Q. Every day of the week?

A. I think I was absent one time for about three days. I don't remember exactly the days I did cub.

Q. Outside of the three days absence?

A. I don't think I was absent more than three days in this six or eight weeks I was there.

Q. Were you there every day of the week or away any time?

A. Every day and Sunday work.

Q. Every day, including Sunday?

A. Yes sir.

Q. How many hours a day?

A. Eight hours.

Q. What kind of work did you do when you were cubbing for record clerk?

A. I posted incoming trains and outgoing trains and regular routine, such as—I don't remember now, just regular routine checking different freight trains, all freight trains, you see, that is, the destination and contents and things like that, you know.

Q. How many different kinds of records do you have to make or keep as record clerk?

A. We had one—two large books there we had to write down on with different colored pencils. One was in-going and one was out-going, different colored pencils, you see. We had to write continually for eight hours.

Q. What did you write in the books?

A. Time of arrival and departure and other necessary information.

Q. Did you write anything about what the train was carrying?

A. I just don't remember. I have been out of it about seven months now.

Q. Now, you say you wrote continuously for eight hours?

A. Yes sir.

Q. Well, was that practice work or was that actually doing the work?

A. I was doing the work as an assistant. I was under the other employees.

Q. Did you actually do the writing?

A. I did the writing in the book.

Q. During this period when you were cubbing for record clerk?

A. Yes sir.

Q. Now, did you do any work during that entire period when you got paid for it?

A. I didn't get pay for the cubbing period. I got paid after I was appointed. One of the men took his vacation, the midnight shift, you know, took his vacation and I was appointed to take his place.

Q. When was that?

A. That was the last nine days I worked from about the 18th to the 27th of May, I believe.

Q. The last nine days of this long period when you were cubbing for record clerk?

A. He took his vacation and I took his place.

Q. For how long a period did you take his place?

A. Nine days—nights, it was.

Q. And after that then what did you do?

A. I quit then. He said I would have to go back to cubbing again and I didn't want to start over again because it didn't seem like there would be a vacancy in the record department. The employees had been there so long I didn't think there would be a vacancy.

Q. Who said you would have to go back to cubbing again?

A. I believe they notified me down there I would have to go back to cubbing.

Q. Do you remember who it was?

A. I don't know, Sir.

Q. And you haven't been paid for any time you spent cubbing?

A. I haven't received any money to date.

Q. Now, did you ever speak to Mr. Born about going to work and drawing a salary?

A. Yes sir, about every few weeks, every two weeks or so I would go to him and he just said I needed a little bit more experience and asked me to wait a little bit longer.

Q. Did you do that on more than one occasion?

A. Yes sir, I asked him, I don't know how many times but it was more than once.

Q. Have you asked him with reference to paying you for your cubbing?

A. I haven't made a request, no sir.

Q. Have you seen them about it?

A. I was down there—the way I understood, a friend of mine told me they had some checks down there for us for the back pay so I went down there and asked for mine.

Q. Did you get it?

A. I haven't got it yet.

By the Court:

Q. What did they tell you when you went down there?

A. They told me they would pay me and I understood they was going to pay me. I don't know whether they will or not but they promised to pay me. I gave them my address at home to mail my check but I haven't received the check.

Q. Now, how long ago was it when you worked there as a cub? When was the most recent time?

A. The last time I worked was last May.

Q. 1944?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Rosenhiem, when was it that you went down there to the office of the general yardmaster recently asking for your check, if it had arrived, for the period of your cubbing or training or posting, as you call it?

A. Well, I haven't been down to the yard. I was down at the office, Ninth Street, where the paymaster is.

Q. When did you last ask about that?

A. I guess it has been about a week ago.

Q. You don't know that your voucher is there for you now?

A. I haven't been down there in a week.

Q. Now, Mr. Rosenhiem, when did you first start your training period for the position as train clerk?

A. I don't know the exact date.

Q. Do you know what month it was?

A. I guess it must have been the latter part of March, I don't know, but counting back six to eight weeks from May 20th.

Q. You have no record from which you could tell us when you first began posting?

A. No. I had a separation notice from them but I couldn't find it last night when I got ready to come over here.

Q. So you don't know now what month it was that you started posting for the position of train clerk?

A. No, I don't remember right now. I have been busy for the last seven months.

Q. You don't know exactly how long you did post for that position, do you?

A. Train clerk?

Q. Yes sir.

A. I trained close to about three or four days, I guess. I saw I couldn't qualify for it because I couldn't use the typewriter.

Q. Now, when you were posting for the position as train clerk did the Railroad Company have there regularly employed train clerks with whom you trained?

A. Yes sir, they were there.

Q. And such work as you did while you were posting there those three days was that work that the regular clerk was supposed to do and paid to do?

A. He did his work, yes sir, and he also tried to show me how to do mine.

Q. You were there trying to learn and he was there trying to show you the nature of the work, wasn't he?

A. I did the work—I mean I did it slow, but I did the work. He was supervising.

Q. And he told you how to do it?

A. Yes sir, he told me how to do it. Somebody had to tell me how to do it.

Q. And it was work that he was there to do himself if you hadn't done it?

A. Yes, sir.

Q. Now, I believe you said that after about three days or thereabouts you say you couldn't qualify for that and so you gave that up?

A. Yes sir.

Q. And then the chief clerk there—you wanted to try for the position as yard clerk?

A. Yes sir.

Q. And then you began posting for that position?

A. Yes sir.

Q. And you posted or trained with the regular employee, the yard clerk or yard clerks there, did you?

A. Yes sir. That consisted mostly of walking around the yards checking trains.

Q. But there was a regular man that walked around in the yards showing you the duties of the position of yard clerk?

A. Yes sir.

Q. And he showed you how to make out these records?

A. Yes sir.

Q. And after he had taken time in showing you how to make out certain records then he began to let you make out the records so you could better and faster learn how to do it, didn't he?

A. Yes sir.

Q. And when you were making out those records and learning how to make them out and learning the job you were making out records that the regular yard clerk was there to make out and paid to make out, weren't you?

A. Yes, sir.

Q. And you say you trained there for that position about a week and couldn't make it or didn't like it and you gave that up?

A. I could have made it but I had a rupture and didn't want to do all that walking if I could find an inside job, that is the reason.

Q. Then you gave it up then of your own accord?

A. Pretty well.

Q. And can you tell us what day or what month it was that you began posting or, Mr. Rosenhiem, you call it posting for the position of yard clerk?

A. No, I don't know the date.

Q. Do you know the date that you gave it up?

A. I don't know the date.

Q. Then, Mr. Born told you you had a rupture—

A. I didn't tell him anything about the rupture.

Q. Anyway, you went to Mr. Born and told him you wanted to give up this posting for yard clerk; you wanted an inside job, didn't you?

A. Yes sir.

Q. And then Mr. Born permitted you to train there for the position of record clerk in the office?

A. He told me I would be more capable of making a record clerk than any other position open.

Q. And so then you began training for the position of record clerk there in the office?

A. Yes sir.

Q. Did the Company have a record clerk there with whom you trained and who showed you the different things to be done?

A. Yes sir.

Q. And he took time out and time off in showing you the duties of that job, didn't he?

A. He showed me. It didn't take me long to do the work myself.

Q. Well, such work as you actually did there, was that work that the regular record clerk was there to perform and paid to do?

A. Yes sir, he did the work. I mean he worked but I assisted him.

Q. You assisted him for your own benefit, didn't you, to learn the duties of that job?

A. Naturally.

Q. And that is why you went down there to cub or train was to learn the duties of one or more of these jobs so that you could qualify yourself for a job, isn't it?

A. Yes, sir.

Q. Now, can you tell us, Mr. Rosenhiem, when you first began to train for the position of record clerk there?

A. No, I can't, Sir.

Q. Upon what do you base the statement that you must have trained there some several days or four or five weeks?

A. Well, in various places, and I trained mostly for the record clerk. That is what I liked best. That is what I trained mostly for.

Q. Were you a pharmacist during that time, back in that period?

A. No, I gave up all my work to go to the railroad.

Q. And then it just takes some people longer to learn the duties of a job than it does other people; doesn't it?

A. I don't know; maybe.

Q. Had you ever had any experience of any kind in keeping railroad records or records even similar to the records made and kept by the record clerks before you went down there?

A. I had no experience whatever when I went down there.

Q. Now, the first work you did, you say, was about May 20th, 1944?

A. Last year, yes sir.

Q. And you were doing this training prior to May 20th, 1944?

A. That is the first work I did for pay.

Q. Well, you keep saying "work for pay". Do you suppose that the railroad business there could have gone on without you being training there?

A. Very well, I guess.

Q. I just wanted to be clear about that. Now, Mr. Rosenhiem, you say you went to work about May 20th, 1944 and worked how many days?

A. Nine days.

Q. And at the end of nine days what happened to you?

A. I relieved a man for his vacation on the midnight shift. He had seven days off and he took an extra two days off.

Q. You were really working extra, weren't you?

A. No, I was working, on the payroll.

Q. On the payroll to fill in the place of a man who was absent temporarily?

A. That is the only vacancy they had, yes sir.

Q. Now, after working nine days was it then that you immediately gave up railroad work?

A. Yes sir, I gave it up because I didn't want to start cubbing again.

Q. Now, Mr. Rosenhiem, did this man whose place you took there for nine days, did he come back to his job?

A. Yes sir, he came back.

Q. Then isn't it the truth that when he came back to his job there was no other place for you, no regular job for you at that time?

A. That is right.

Q. And you didn't want to be put in the position of not having a regular job down there, just working extra when a man would happen to be away temporarily from his regular job, and this kind of working extra didn't appeal to you, and since there was no regular job available you just decided to quit?

A. No, I didn't see anything coming up in the near future so I quit.

Q. Now, isn't it a fact that Mr. Born, the chief clerk there, told you when this man came back that he had no regular job for you or a job for you at that time and suggested to you that some more training wouldn't hurt you, and suggested to you that you go ahead and better qualify yourself during the time when there was no job for you at all?

A. No; he didn't say anything like that at all.

Q. Mr. Rosenhiem, when you went down there sometime in 1944 and made application for position as clerk and began your training period I believe you have stated you did it for your own benefit?

A. Yes sir.

Q. And at that time were you promised any compensation whatsoever for your time or for your presence during this training period?

A. None whatever, but I was promised that in about ten or fifteen days I could qualify for a position.

Q. In other words, Mr. Born told you it would take you ten or fifteen days—you look at me—

A. Excuse me.

Q. —to qualify for the position which you sought; that is what he said?

A. Yes sir.

Q. Did he promise you any pay for the ten or fifteen days or whatever it was?

A. No sir.

Q. You understood during that time when you went

down there, during the time that you were training, that you weren't to be paid for the time that you were training, is that right?

A. Well, I was cubbing and I didn't expect anything.

Q. You don't know whether voucher has been issued for you or not?

A. No, I haven't received any.

Q. You will be glad to get it, won't you?

A. I don't know.

Redirect Examination,

By Mr. Jansen:

Q. Mr. Rosenhiem, Mr. Whitwell asked you one question, he said something about it taking one person longer than another to learn something. Now, if I understand you correctly, when you were cubbing for this record clerk you were keeping one or two books, or was it only one book?

A. It was one large book and a group of smaller ones.

Q. How long did it take you to catch on to that work?

A. I did my work efficiently when I was appointed, when the man took his vacation, and that was the first opening they had.

Q. And you had done it before that time?

A. Yes sir.

Further this witness saith not.

The next witness, MAJOR GENERAL PRINCE, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Major General Prince?

A. Yes sir.

Q. How old are you?

A. Fifty-nine.

Q. Where do you live?

A. Chattanooga.

Q. How are you employed at the present time?

A. Combustion Engineering Company.

Q. What kind of work do you do for them?

A. Well, at the time I am office clerk.

Q. Did you have to cub for that job?

A. No, I didn't cub for it. They just gave it to me.

Q. Did you work for the NC&StL Railway?

A. Yes sir.

Q. And before you worked for the NC&StL Railway what kind of work did you do?

A. I worked at the Comoustion.

Q. Oh, you worked at the Combustion?

A. Yes sir.

Q. What kind of work were you doing there then?

A. You might call it boilermaker, is what we always called it. Rivet driver is what it was.

Q. And when was it you started with the NC&StL Railway?

A. The third week in March, I believe.

Q. What year?

A. 1944.

Q. Last year?

A. Yes.

Q. Did you have to spend sometime cubbing or posting?

A. Oh, I spent about five weeks down there and worked four days.

Q. Five weeks cubbing or posting?

A. Yes sir.

Q. How many hours a day?

A. Well, I would cub as high as twenty-four.

Q. Sir?

A. Three shifts.

Q. You mean you cubbed twenty-four hours in one day?

A. Maybe twice, I wouldn't say. I know we cubbed once twenty-four hours, first, second and third shifts.

Q. Well, generally how many hours a day?

A. I generally cubbed ten or twelve, something like that, just go home when I got ready.

Q. Every day?

A. Every day except Sunday. I didn't go on Sunday. I did go one or two Sundays too.

Q. Were you off, as far as you can remember, a single day?

A. I was off one day, just a day sick, because I didn't feel like working.

Q. But was it every day, except those Sundays you didn't work and the one day when you were sick, that you cubbed through the whole period at least ten or twelve hours a day?

A. Yes.

Q. Have you ever been paid for any of that?

A. If I have I don't know anything about it.

Q. You mean you have never been paid?

A. No sir.

Q. What job did you cub for?

A. Yard clerk.

Q. Any other job?

A. No sir.

Q. What do you have to do when you are a yard clerk?

A. Well, several different things, several things added on it. I couldn't hardly say, but checking or tagging cars, and taking seals off cars, the numbers of the seals, and putting them back on, especially where the car goes into town. That is mostly the job. That is what they have to do, the way I figure it.

Q. And did you do that while you were cubbing?

A. Yes sir.

Q. Was there another yard clerk with you all the time?

A. Just part of the time.

Q. Was that part of the time in the beginning of your cubbing or along toward the end of your cubbing? When was that?

A. He went with me maybe for an hour or two and I finished it up by myself.

Q. Every day?

A. Mighty near every day that way.

Q. And that happened day after day?

A. Yes sir.

Q. Did you ever talk to anybody about working regularly or getting a job where you would get some pay?

A. No, I never asked anything about it.

Q. Did you ever work during that time for pay?

A. No sir.

Q. You didn't?

A. No sir.

Q. Mr. Prince, to refresh your recollection, didn't you work on three different Tuesdays and get pay for it?

A. I don't remember two different weeks what I did—I worked in two different weeks—I have got a paper (looking for record).

Q. Have you got a record of it?

A. Yes sir, if I aint got away with it. Yes sir, here it is.

Q. What is this you have in your hand?

A. That is the dates I worked that I have marked on the calendar.

Q. These are sheets from a calendar?

A. Yes sir.

Q. Can you refresh your recollection by looking at that and tell us what days you may have worked and gotten paid for?

A. April 18th I worked and doubled over and made two days, then the 25th I made one day and then May 2nd I made another day.

By the Court:

Q. What year?

A. 1944.

By Mr. Jansen:

Q. And was that during the time that you were doing this cubbing?

A. Yes sir, I worked four days in that time.

Q. What did you do the days before you worked and got paid?

A. I didn't do nothing only just those four days I was paid—

Q. Did you do any different kind of work on the days you got paid for and those days you were cubbing?

A. No, I just worked on the yard clerk job.

Q. You mean to say it was the same kind of work?

A. The same work. I never did cub any other job but that one.

Q. So, if I understand you correctly, you would do cubbing for a few days and then one of these days would come along and you worked and got paid for it?

A. I cubbed about three weeks, I guess, something like that, that is, before I went on the payroll.

Q. How did you know you were going to get paid; how did that come about?

A. Mr. Boren put me on the payroll, made out a slip and put me on the payroll and the next day or two I went to work.

Q. Was some regular man absent or something like that?

A. I imagine so by that.

Q. Then after you worked for that one day, what did you do after that?

A. I cubbed the next day.

Q. And that happened on these different occasions as you were going along?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Major General Prince, were you working for the Combustion Engineering Company during any of the time when you were training down there for the position of yard clerk?

A. No sir, I didn't work anywhere.

Q. Can you tell us when it was that you went down there and applied for a position and asked them to cub?

A. In the third week of March. I don't know what date it was but in the third week in March I asked for a job.

Q. And when you made your application you were told, I believe, that you would have to post or train for a period before you could qualify for the job?

A. He said that I would have to work, it might be three or four weeks or it might be a month, he didn't know, but I would have to work several days before I would get to work any.

Q. He said you would have to cub a while, didn't he, or train awhile before there would be a job for you—that is what he said?

A. He said I would have to cub a while before I got to work any.

Q. And you understood that before you went down there, didn't you?

A. Oh, I imagined I would have to do that to get onto the work.

Q. And you understood before you went down there and before you started this cubbing, as you call it, that you were not to be paid during the time of your cubbing?

A. He didn't say anything about being paid.

Q. Now, you say on about one day there you cubbed or trained three different shifts?

A. Yes sir, I cubbed twenty four hours a time or two.

Q. Well, you did that to learn the job, didn't you, that you had applied for?

A. Well, he wanted me to stay there and do that, cub them shifts.

Q. Well, he didn't ask you to cub all three shifts the same day, did he?

A. Not exactly. He asked me to cub two of them a time or two and the third shift then began and I had no way getting home so I just stayed the third shift. In a way he wanted me to learn the third shift. He was expecting a job to be open on the third shift and he wanted me to learn that too.

Q. Isn't it a fact that when you cubbed the first shift, if it had suited you, you were at liberty to leave right then and cub another shift at another time?

A. Well, he never told me anything about that.

Q. You weren't required to cub three shifts one day, were you? Sir?

A. He never told me nothing about cubbing three shifts.

Q. And if you cubbed three shifts in one day you did it voluntarily, didn't you?

A. Well, he told me to cub them. He told me he wanted me to cub the second shift a time or two, that is all.

Q. He didn't tell you you had to cub two shifts or three shifts on the same day though, did he?

A. Well, he told me to cub a time or two on the same day, to double over.

Q. You don't happen to have anything against the Railroad, do you?

A. No sir, I ain't against the Railroad for I worked for them four years ago.

Q. Now, you referred to a calendar record, I assume you have a record from which you made the statement that you cubbed five weeks?

A. Well, I know I went to cubbing the third week in March. That is all I have got. I have just got here the days I worked.

Q. You made that statement from memory, didn't you?

A. Three weeks—I don't know what date it was, in the third week in March.

Q. What impressed it so much on your mind that it was the third week in March?

A. Well, that is where I got it in because I cubbed that many times, that many days of the week. I went down there the third week in March. I don't know what date it was.

Q. Well now, why is it that you make that statement that you started the third week in March cubbing?

A. Well, that is where I figured it. I said I went down there the third week in March.

Q. You just say that because you just figure that?

A. I went down there in the third week in March.

Q. Now, you say you worked there April 18th?

A. Yes sir.

Q. Now, from what source did you get that date?

A. Mr. Born told me the first shift and then when the shift come on, he asked me to work the second.

Q. I am asking you this: from what source did you get the date April 18th, 1944?

A. Well, I went home and got the date on my calendar so I would remember the days I worked.

Q. That day you worked, you put it on the calendar?

A. Yes sir.

Q. And the days you cubbed you put nothing on the calendar, is that right?

A. That is right; no sir, I didn't put anything.

Q. Did he tell you he would pay you the regular established rate for that day, April 18th?

A. He didn't tell me what he would pay me.

Q. Well, did you get paid for it?

A. Yes sir.

Q. Now, why were you so interested in putting that date on the calendar when you said you put nothing on the calendar and made no record of the dates when you were cubbing?

A. Well, that is a good way to keep a record of what you work for.

Q. Wouldn't it have been nicer to have kept record of the dates you cubbed and have put them on the calendar?

A. There wasn't any use of it; I wasn't getting paid for it.

Q. Therefore, you were paying no attention to that then?

A. I wasn't getting no pay for it and there wasn't any use.

Q. There was nothing to impress it on your mind, was there, the days you were cubbing?

A. No, just lots of work, that is all.

Q. When did it become impressed on your mind that you had cubbed or trained for five weeks?

A. It didn't bother me at all.

Q. When did you first begin to think about it?

A. I didn't think about it at all. When I worked I wanted pay for it, that is all.

Q. You are just guessing now about the period of your training, aren't you? Sir?

A. When I work I put it down where I won't forget it.

Q. I am talking about your cubbing now—you are just guessing about that?

A. No, I know I am coming closer than that.

Q. Now, at the time while you were cubbing, Mr. Prince, you were cubbing with a regular employee, weren't you?

A. Well, I imagine he was. I never asked him. I imagine he was regular.

Q. And it was a regular yard clerk who went around there with you and took time to show you some of the duties or the various things a yard clerk has to do upon becoming employed, didn't he?

A. He went around a time or two with me, yes sir.

Q. What did he do that time or two he went around?

A. He showed me the tracks, where the tracks laid and the numbers. I think that is about all.

Q. He didn't show you anything about how to make record of cars that were destined to certain points or shifted to certain tracks and things like that?

A. He did in the office. He showed me how to make out cards and tack on the cards.

Q. You learned that in the office?

A. Yes sir.

Q. And you learned on those one or two trips, as you have stated, all you know?

A. There wasn't no use to have to go every day with a man. If you do he never will learn it. If you are not going to learn it then you will never learn it.

Q. Well, after he went around and showed you—he first went around and showed you how to do things, the location of the tracks and things like that, didn't he?

A. He showed me the tracks the first day I went around with him.

Q. Then do you say he never went around with you any more after that?

A. No. He at first made one trip a day out there and showed me some different things. He would show me or something of that kind.

Q. And just turned you loose there after one or two trips?

A. Just a few trips.

Q. And then you cubbed five weeks and then you worked three or four days and quit?

A. Yes sir. I cubbed about a week after I worked the last day.

Q. Now, on this April 18th that you speak of that you worked, you say some man had to be off his job temporarily?

A. I imagine he was by me being on the job.

Q. And then you worked extra on or about the 25th, you say?

A. Yes sir.

Q. Then you worked again about May 2nd?

A. Yes sir, I believe it is.

Q. Were you paid the regular rate, the established wages for those jobs for that time?

A. I never asked what the pay was but I got paid for four days. I never asked them but I got the pay.

Q. And then was it along about that time that you quit and left the Company?

A. I quit about a week after I worked the last day, something like a week or ten days.

Q. Do you know that a voucher has recently been issued covering the period that you cubbed down there?

A. What was that?

Q. Do you know that a voucher has been recently issued for the period that you cubbed or trained for this position?

A. I don't know.

Q. If you get that voucher, if it is already issued and already gone, if you get that will it be satisfactory to you?

A. I don't know.

Q. Sir?

A. I couldn't say. I don't know about that.

Redirect Examination,

By Mr. Jansen:

Q. Just one or two questions, Mr. Prince. Is your present address the same address that you have been living at for sometime?

A. Yes sir.

Q. Does the Railroad have your address?

A. Yes sir.

Q. And they have had it ever since you cubbed down there?

A. Yes sir.

By the Court:

Q. Did the Railroad Company promise to pay you anything during your training period?

A. No sir.

Q. Did you understand that you were working without compensation during that period?

A. They never said anything to me about pay at all.

Q. Well, did you expect any compensation for that period?

A. No, I wouldn't expect it for I don't think they paid it.

Further this witness saith not.

Mr. Jansen: If it please the Court, at this time I would like to offer the deposition of Mr. Born, John Edwin Born, and with the Court's permission, I would like to ask Mr. Cadra, who is associated with me in this case, to read the deposition.

The Court: Who is Mr. Born? Why don't you bring him in? Is he available?

Mr. Jansen: Yes sir, he is here. We have taken his pre-trial deposition. We subpoenaed Mr. Born to bring certain records but as long as we took his pre-trial deposition we don't—

The Court: Well, if there is no objection, go ahead. How long is the deposition, very long?

Mr. Jansen: Oh, about twenty or thirty pages, direct, I think.

The Court: All right.

Mr. Whitwell: I might make this preliminary statement. Mr. Born is here and in all probability we will use him. I just make this statement for the benefit of counsel.

The Court: Is Mr. Born here in court now?

Mr. Jansen: Yes sir, he is.

The Court: I think you had better put him on the stand then, Counsel. I don't exactly understand using the deposition of a man that is right here in court.

Mr. Jansen: Therefore, if I might examine Mr. Born as an adverse witness. He is chief clerk of the Chattanooga Cravens Yards.

The Court: Do you want to point out any reason why you should be permitted to use his deposition when the witness himself is sitting right here?

Mr. Jansen: I say if I may be permitted to examine him as an adverse witness on the witness stand, I have no objection.

The Court: Is he an employee of the Railroad Company? This is the same man you have the deposition of?

Mr. Jansen: Yes sir.

The Court: Very well. Proceed to call him up here.

Testimony of J. E. Born

The next witness, J. E. BORN, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is John Edward Born?
A. Yes sir.
Q. You live in Chatanooga?
A. Yes sir.
Q. You are employed by The NC&StL Railway?
A. Yes sir.
Q. Chief clerk, are you?
A. Yes sir, Cravens Yard, at the yard office.
Q. You are the man who takes applications for employees at the Cravens Yard?
A. For certain employees.
Q. Which ones?
A. Callers, messengers, porters and clerks.

By the Court:

Q. Stenographers?
A. And stenographers.
Q. You don't take applications for trainmen?
A. No.

By Mr. Jansen:

Q. Except for the final approval, you have authority to hire and fire employees?
A. To a certain extent, yes sir.
Q. Now, Mr. Born, prior to a short time ago you had a practice at the Cravens Yard of posting or cubbing these office employees that you have just spoken about, did you not?
A. Posting, yes sir.
Q. And when you were posting one of these employees did you keep record of the hours worked?
A. I kept a separate memorandum in my desk drawer, just a pencil memorandum, in order to know just about how long a man was posting to determine about when he should be able to qualify.

Q. Well, you mean you took—you made a memorandum of the time he started?

A. Yes sir.

Q. And then whenever you thought you might want to think about him you would look and see how long he had been on and get that information from your pencil notation?

A. I watched that fellow to see about how many days he had been posting and then would question him and talk to him and determine just how much he had learned.

Q. Now, did you make record of the actual hours he worked?

A. I did on this memorandum.

Q. What did you do with that record?

A. Well, I kept them filed up there and they accumulated in my desk and I put them in the other office and some of them have been misplaced, some other were knocked off and destroyed, and some got wet due to the plumbing leaking.

Q. When Mr. Porter, Inspector of the Wage and Hour Division came down to see you did you check the records of hours worked by all these various employees?

A. As nearly and as correctly as I could from looking over the personnel itself and a knowledge of the conditions.

Q. The hours worked or the days worked, which?

A. The number of days. I didn't try to keep the hours.

Q. That is what I am getting at. I asked if you kept record of the hours. You didn't try to figure the hours?

A. No, I figured a day as eight hours.

Q. And that is the only record you kept, the actual days worked?

A. Well, in some cases I tried to keep a memorandum of the hours they worked on one shift and probably two or three hours on another shift.

Q. That might have occurred a number of times?

A. That occurred a few times.

Q. How about where they worked double time, worked two shifts in one day, did you keep a separate record of that?

A. They didn't work, now; they posted. And I kept a little memorandum of that for my own personal benefit.

Q. But not for the records of the Company?

A. No sir.

Q. That was a memorandum that you kept for your own personal benefit?

A. That is right.

Q. Now, Mr. Born, do you still post callers, messengers, porters, stenographers and yard clerks?

A. Yes sir.

Q. Do you pay them now?

A. Yes sir, we pay them.

Q. How much do you pay them?

A. I don't know the exact rate, but I think it is forty cents an hour while they are posting.

Q. Is that wages?

A. No sir, it is not wages.

Q. It is not wages—what is it?

A. It is just merely an incentive payment or inducement or gift to them to encourage them to stay there and learn something about the work so that they can qualify to take a job as soon as we can use them.

Q. So you don't admit that you are paying any wages to any of these types of employees?

A. Not to the trainees, no sir.

Q. These cubs?

A. While they are posting, no sir, that is not wages.

Q. And none of the money that you are paying now to a caller, messenger, stenographer, porter, yard clerk, record clerk, tonnage clerk or a clerk who is cubbing or posting is paid to him as wages, is that right?

A. No sir.

Q. That is right—it is not paid—

A. It is not paid them as wages.

Q. What kind of work does a porter do?

A. Well, he has got two offices to look after and there is quite a bit of routine in connection with his work, sweeping up two floors, keeping the dust off the records, washing out the lavatories, taking out cuspidors and running a few little errands for the operators.

Q. How long does it take a porter to get on to sweeping the floor?

A. Well, the young boys we have had down there on that particular work, young school boys, it takes those about normally two days to get onto the system and routine and to know just exactly how to take hold and carry it on without any possibility of delay or interference. I have got one boy now that has been there a week and he don't know how to use a broom.

Q. Is he still cubbing?

A. No, I have got him on. He is on duty.

Q. What do you do with a porter? Do you have to follow him around and watch him sweep? And clean out cuspidors?

A. Some of them take a day and some of them take two days to know the location of the various waste baskets and what to do with all the rubbish and where to get their supplies to replenish toilet supplies and what to do up at the general office and in the little offices. I don't have to personally go around and show these details to these boys but have a regular porter to follow him around and see what he does and tell him and explain about all these little things throughout the time of posting.

Q. Then after he gets through with this one day's posting you pay him real wages?

A. As a rule, I am ready to put him on by the third day as a regular, full, hired employee and pay him wages.

Q. But up until that time whatever you give him is a gift?

A. That is right.

Q. How about stenographers, are they posted, too?

A. Yes sir, we do. We find it necessary to have them post to learn the filing system and learn about the various and numerous reports that we require them to get up from different records that we have there in the office.

Q. You don't operate a business college at the railroad?

A. Oh, no.

Q. You accept anybody applying for a job as stenographer who is a graduate of a business college, don't you?

A. Well, ordinarily, yes sir.

Q. And who have some training, as a matter of fact?

A. Yes sir.

Q. And you have required stenographers and even do now to post even though they may have had ten or twelve years' experience in taking shorthand and writing letters on the typewriter?

A. We don't require them to post to determine their fitness for taking dictation and transcribing their notes right on the typewriter.

Q. Oh, you don't?

A. But we require them to post to learn the routine duties in connection with that kind of work that we have, various reports they have to get out, and the filing system there. They would be at a loss if we didn't require them to do that.

Q. So the posting you require stenographers to do is to learn the special system that the NC&StL Railway has with reference to files, records and the like?

A. That is right.

Q. And until they have had sufficient experience with this system that railroads keep you keep them posting, is that right?

A. Yes, sir, I let them post until I think they understand the routine and what there is to do in connection with the duties of the job so that they can handle it by themselves.

Q. What is the average time that a stenographer spends posting?

A. Well, that would depend on the ability of the applicant.

Q. Well, what is your experience?

A. Well, we haven't had so very many stenographers down there, two of them about two days each.

Q. You think that would be about the average?

A. About five or six days would be the average time that they would consume in learning the routine.

Q. One of them did it in two days?

A. That is true. Mrs. Born did that.

Q. That was your wife?

A. That is my wife and she didn't complete the cubbing but I was forced to use her because I was in trouble and

had to have help, and I had to do the biggest part of the work.

Q. Is she the only one that you know of, that is, a stenographer cub, that was able to complete their posting in two days?

A. She didn't fully complete her posting in two days but I had to have someone there that could take dictation and I had to teach her the rest of the job after I put her on the job.

Q. That was one case where the shoe was on the other foot, she was taking dictation from you?

A. Yes sir.

Q. But otherwise, generally the average is about six days?

A. Yes sir. It would have taken her that long, you understand, but we were so far behind I had to have somebody there and I couldn't get any other stenographer anywhere and I had to put her on the payroll and get her to take some of these letters and correspondence and get it out of the way, we were so far behind.

Q. Now, do you require callers to post?

A. Yes sir.

Q. What does a caller do?

A. A caller calls train crews. Train crew callers call train crew members and engine crew callers call the engine crew members, and the train crew callers in my office are in our yard department and they call the train crew members when the train is ordered, at their cabooses and at their boarding places, and they keep a roster of those crews and when their rest period is up and when they are ordered and see that they are notified and called within their legal time before departure so that they can get ready for their runs. And they have to have a permanent record, make up call cards and see that they are filled out and keep up with all these men.

Q. How long ordinarily do you require a caller to post for this job?

A. That depends on the ability of the boy, the applicant, and they learn that work there sometimes one day and sometimes maybe it is three days before they can get on to the routine and understand enough about it, and

this register where these train crews register, it is not simply—it is simple as far as reading and writing is concerned but to understand the different classes of crews that we have on there, these boys have to compile their lists so they will know which crew goes on which run and a new boy, he can't understand that.

Q. So do you send around with him another caller?

A. We send around with him another caller to learn him the various cab tracks and how to find the various places in the yard that the cabooses might be located on, where their boarding places are, their telephone numbers, how to read those registers, how to keep the train numbers marked up with the crews in their proper order.

Q. Now, when you have a caller or a porter or a stenographer you usually tell them when to report, do you not?

A. Yes sir, I tell them, now, you can come out in the morning. I generally try to break in a new person or applicant on a day job so he can get used to the yard, so he can see where he is at, get him located, because it would be too dangerous to put him on that job at night. There is too much hazard there. He would probably get run over and wouldn't know how to take care of himself, and I start him out in the daytime for that reason and generally tell him to come out on the shift that goes to work at 6:30, to report to this other caller there and he will show you the duties of that job.

Q. These messengers, what do they do? Do you cub them?

A. I have to post messengers to learn the various offices throughout the town. They have got a route to go over to distribute mail without getting it mixed up or misplaced and what to do with certain classes of mail.

Q. Do they travel around by bicycle?

A. As a rule they do. Sometimes they ride the busses and sometimes they walk.

Q. How does a cub travel when he is cubbing a cub?

A. He generally goes along with him. Sometimes they have to double up, two on one bicycle, one on the handlebars and one on the seat.

Q. How long ordinarily does a messenger cub or post, on an average?

A. About three days.

Q. Now, you have heard the testimony of Mr. Rosenhiem and Mr. Prince, have you?

A. Yes sir.

Q. They cubbed for a clerk's job?

A. They posted for a clerk's job.

Q. And those are the jobs, remaining jobs that you haven't yet testified about, the various clerks' jobs?

A. I haven't talked about them yet.

Q. In the way of clerks' jobs you have a weigh clerk, train clerk, yard clerk and record clerk, is that right?

A. No, we don't have a weigh clerk.

Q. Waybill clerk?

A. No.

Q. What are the classifications?

A. We have yard clerks, train clerks, tonnage clerks, interchange clerks, record clerks, utility clerks, stenographer-clerks and chief clerks.

Q. About eight different classifications?

A. Yes sir.

Q. Do you require a man applying for the position of any of these outside of chief clerk to cub for it?

A. To post?

Q. Or post?

A. Yes sir.

Q. What is the average time that a man is required to post for the job of yard clerk, for example?

A. Well, the average time for an alert and energetic and apt applicant is about a week to get just enough of the fundamentals of the job where we can risk him on it with the help of the other clerks. That is the average time for that type. For those that appear to be slower and not quite so quick to learn, the average time is around twelve days.

Q. That is a yard clerk, a fellow that goes out in the yard and gets the numbers off the cars and marks the cars and whatever the duties might require, that part of the job?

A. Yes.

Q. Now, does that average time apply to record clerk or does it?

A. The same thing will apply to that type of applicant for the record clerk.

Q. How about the train clerk?

A. About the same.

Q. In fact, for any one of the clerks' jobs you think that is a fair statement that it would require, the average time it would require a man to cub or post before you could put him on regular?

A. Well, we have been forced to cut that posting time down due to labor conditions and on account of the war to about that average but they are far from being—

Q. When did you start cutting the posting time on account of the war?

A. Due to the need for help—

Q. Tell me, now, Mr. Born, how do you account for the fact that Mr. Rosenhiem cubbed for five or six weeks?

A. Mr. Rosenhiem was very, very slow to learn and I sent him out on the yard on one trip with one of the outside yard clerks and he told me he was scared of that kind of work and didn't want to train for it and I showed him the train clerk work and he said he would like that but after I explained to him he thought it was a little too detailed for him to remember and catch on to and he asked me about record clerk and I said, "Well, you can probably do that record clerk work and relief work." I said: "You learn that." I said: "I will let you work some on that." I said: "That is about all you can do" and I put him over there to learn the record clerk, and he was so very slow in learning, in fact, he never did learn it to the extent where we didn't have to check it a lot, that is, follow it up, the regular clerk did.

Q. When a man is learning the job as record clerk like Mr. Rosenhiem was, does he actually make entries in the books?

A. He made quite a few of them and did quite a little bit of that in order to show him how to get the records down and how to find the different pages in the records and so on.

Q. What do you do, keep a man there cubbing or posting until you find him a job or until he becomes discouraged and quits or what?

A. No, we let a man post on long enough to qualify himself, that is, to understand enough about the work that we can risk him on that job, and then with the cooperation and help of the regular clerks all along, why, that man, in time, gets time to take care of some of the work.

Q. Don't you think you have the responsibility to tell those men they can't qualify for the job and they ought to go and look for a job some place else after they have done two or three weeks of this cubbing?

A. Generally I do. Now, in Mr. Rosenhiem's case, as I said, he was very slow and I felt sorry for him and wanted to help the man. He told me he needed work and was anxious to get work, would like to work, and I took a little more pains with him than I would have with anybody else.

Q. How do you account for the fact that you let him work for nine days and then wanted him to go back to cubbing again?

A. Because he trained and only learned one job, record clerk's job.

Q. Go on. I still don't understand.

A. Well, he was trained and learned the record clerk work only.

Q. Yes sir.

A. He tried the yard clerk about half a day and gave it up; he couldn't make it. He tried train clerk probably a day and a half and then during idle moments while posting on the record clerk he would go over and sit down beside the train clerk and watch that class of work. He readily saw that he wouldn't be competent to do that and then he asked me to let him continue to learn thoroughly the record clerk's work. So I told him to stay over there until he learned it. Well, he was very slow and I let him stay there longer than I would anybody else because the boy had already been promised off on his vacation and I didn't have anyone else that I could turn loose on the record clerk, so I thought probably I could fall back on Mr. Rosenhiem if he stayed over there and learned enough.

Q. You turned him loose for nine days then?

A. Yes sir, I let him work the job for nine days as an employee.

Q. Then explain why you wanted him to go back to cubbing again.

A. He wanted more work. He was only qualified for this one class of work. He knew nothing about train clerk and yard clerk and I told him: "You could do that work if you knew it but you don't know it. You will have to post a little bit on this to know the routine" and he gave up.

Q. You did ask him to go back to cubbing again?

A. I didn't ask him to cub. I told him if he wanted to get some more extra work it would be necessary for him to post. I didn't tell him to cub.

Q. You said in order to get extra work, that is, get on the extra board and be qualified to take this record clerk job it would be necessary for him to post, is that right?

A. He posted on the record clerk's work and learned that clerk's work only and he was on the extra board after I put him on the payroll and he filled the job of record clerk and got the full rate of the job. He was on the payroll in the capacity of an extra employee but he wasn't capable of doing these other types of work and I couldn't give him enough work. There are only three record jobs and those boys wouldn't lay off enough to keep him up; he would starve to death and they had to live too and that was the only type of job that he knew, the only type of work. Then he wanted to do some of this other and I said: "You don't know that. It will be necessary for you to post a little bit on that and learn something about it." He didn't care for the outside work and gave it up.

Q. A few minutes ago you said while he was doing this record clerk's job if he had a few idle moments he would go over and look at the train clerk's job.

A. He did have a few idle moments. He had plenty of idle moments. The regular record clerk did the bulk of the work and he sat on a stool over there and grinned and looked out the window and once in a while he would get up and come over, saunter over to the other part of the office to the train clerk and sit down and talk to him and watch him a little while and then directly he would come back and we were so rushed and so behind in the work that the regular record clerk couldn't turn loose

altogether for any length of time. He was too slow but we did let him post some records. We had two books and we let him post—they are both the same size, great big books and there is a hundred sheets in there and we work the record on both sides and you have to find a certain page, and he has got to know where to reach for it without tearing a page out of the book and the man that has got the knack of it can do it, can put down the record, the complete record of a train there in just a minute where a new man that is slow would take fifteen or twenty minutes.

Q. Tell me, Mr. Born, how do you account for the fact that Mr. Prince cubbed and then on different days in different weeks he worked and got wages and then went back to cubbing again?

A. Well, to my recollection, Mr. Prince didn't cub quite as long as he said awhile ago. Mr. Prince was a sincere fellow and I had patience with him. He was very slow and I thought I could get him to learn this simple job of yard clerk and that was the only one he trained on. I knew he wasn't capable of doing the tonnage clerk's job or more responsible jobs and I let him cub several days, I forget the exact days, approximately ten or twelve days on the yard clerk job. Then a vacancy showed up. One of the regular men was off. Then I put Mr. Prince on the payroll at the full rate of that job. He became an employee at that time and then he worked different vacancies of the yard clerk class only. He didn't work as train clerk or tonnage clerk or record clerk. He knew nothing about those and after working this yard clerk vacancy, you see, we have three shifts, twenty-four hours. A job would be open, the first shift, and I let him work that a day or so, and on the second, double through. That is another job. While he wasn't working on that job he came over and hung around and sat around and posted, so to speak, trying to learn something of the other work.

Q. So he would work one day, you say, paid to work as an employee?

A. Yes sir.

Q. And then he would skip the next day and post and then he was not an employee?

A. No, he didn't cub all the time with my consent as a trainee. He came down there several times and I asked him "What are you doing?" And he would say: "Nothing. I thought I would some down here and see what I could pick up." I didn't have any objection. He was already employed then but he was an extra man and had no work assigned, no job to go to.

Q. Now, if I understand it correctly, Mr. Born, you didn't know there were instructions from the Railroad to pay at least forty cents an hour to these cubs or people that were doing posting for these various jobs until just very recently, is that right?

A. That is when I knew of it right here, I believe it has been since the first of the year or maybe prior to the first of this year, that I was instructed or understood that they had to be paid forty cents an hour when posting.

Q. That is not wages though?

A. No, that is not wages. If they got wages they would get the full clerks' rate or the jobs' rate.

Q. Now, have you paid off all of these cubs or posters that posted before that time?

A. Oh no, they haven't been. Vouchers have been made for all of them, everyone of these trainees. What you speak of as cubs, I speak of as trainees, that posted. Vouchers have been made out for approximately the amount of time that they spent, consumed in posting.

Q. How did you figure out their time?

A. From personal memory, their being right there under my supervision and knowing just about what each man did, how slow and how proficient he was.

Q. Well, you, as a matter of fact—

A. I approximated the time as nearly correct as I possibly could get it.

Q. Do you have those vouchers with you?

A. No, but I have a record of them. I have record of everyone that has been issued.

Q. Have you delivered them in person or mailed them?

A. We cannot mail a man's voucher to the man's home or address unless he requests us to do that.

Q. You had Mr. Rosenhiem, did he request you to do that?

A. He did not request us to do that.

Q. Have you got a voucher made out for him?

A. There has a voucher been made out for Mr. Rosenhiem.

Q. For how many hours?

A. I don't know without referring to the record but that voucher is made out and in the Chattanooga office right now.

Q. As a matter of fact, it is a matter of your own personal guess as to what hours these cubs worked?

A. Not a matter of my own personal guess because I did have a lot of records.

Q. Well, about the only ones that were lost were these pencil memoranda that you kept?

A. I knew pretty well myself from close supervision of the cubs about how long these men, different men posted, approximately and if I was in doubt I conferred with the other clerks that they had posted with and talked with them and said: "How long—I have lost my memorandum—did so-and-so post with you, for a week?" and they would scratch their heads and say: "This cub posted with me three days and with so-and-so three days" and I would make a note, and in that way I would make a pretty accurate figure of the time they had put in.

Q. Have you got a record of the hours now?

A. Yes sir.

Q. But up until that time you didn't keep a record?

A. We did keep records but I didn't put them down right there where I could have handy reference to them.

Q. Did Rosenhiem ask you for his check?

A. He didn't ask me.

Q. Are those checks in your office or in the paymaster's office?

A. I didn't have anything to do with delivering the checks. We have one man in Chattanooga here, you might say, like a paymaster's office that pays the employees and these checks come to him under seal and they break the seal and take the checks and then they deliver them out to the different offices during certain hours and after those certain hours the men know where to go to get these checks.

Q. You don't know there is a check for Rosenhiem, you have never seen it?

A. I have got a list where it has been made out.

Q. Do you know for how many hours?

A. I can refer to that and tell you.

Q. Let's see it.

(Witness looks for the record).

A. 120 hours, $48.00 is what voucher has been made out to Mr. Rosenhiem for.

Q. 120 hours, that would be three weeks at 40 hours a week?

A. At forty cents an hour.

Q. How many days a week did Rosenhiem work?

A. Well, Mr. Rosenhiem worked about two weeks nearly every day.

Q. How many hours a day?

A. Eight hours. He would average eight hours. Sometimes he would leave before the job was through and go off duty. Sometimes he would come down late, and then during the cubbing or posting period on two different occasions to my knowledge—he said one but I know of two—one he was gone three days and the other one he was gone two days.

Q. So all you have got is practically three weeks or fifteen days of posting?

A. Yes sir.

Q. Of eight hours a day—that is what you have got for Rosenhiem, is that right?

A. Yes sir.

Q. And that is all you intend to pay him?

A. Well, if he can show me where he posted more than that I would recommend more for him but he didn't post more than that.

Q. How much have you got down for Prince?

A. Mr. Prince, there has been a voucher made out for Mr. Prince—let's see, it is right here—I have a paper, fifty six hours, that is seven days.

Q. Seven days at eight hours a day for Prince?

A. Mr. Prince didn't post the full time that he said he did.

Q. According to your record?

A. According to my record.

Q. Now, can you tell me from what records you got the information with regard to Mr. Rosenhiem and Mr. Prince by which you arrived at those figures?

A. Yes sir, from talking with the other clerks in my office that they were associated with and with whom they posted.

Q. How many clerks did you talk to with regard to Rosenhiem?

A. Three.

Q. Why was that?

A. Because they observed him there in the daytime and on the second shift, on the two shifts, with other clerks he posted with, at the time he posted.

Q. How many have you talked to with regard to Prince?

A. Two.

Q. And you took their word for it?

A. With my own knowledge of about how much time he spent to help me along. I talked to them about it.

Q. Now, Mr. Born, am I correct if I understand that you tried to get those clerks to post on all of the different three shifts during the day or some time or another?

A. Yes, sir, I required that because after dark falls the picture in the yard changes. It is more hazardous in a railroad yard at night than it is in the daytime and they can't identify the tracks in the night like they can in the daytime. They don't have illuminated signs to tell where each track is.

Q. You require them because of that that they post at least the different shifts sometime or another?

A. Now, they have to familiarize themselves with the lights, engine movements and the routine of night work.

Q. Have you got a record there with reference to this man Curtis Bomar?

A. He is at Fayetteville and Murfreesboro and that is entirely out of my district. I have nothing to do with that whatsoever.

Q. Fayetteville and Murfreesboro have nothing to do with Cravens Yards?

A. I am a personal man right there in Cravens Yards, right there in Chattanooga.

Q. In order for a man to really get some benefit out of his posting he has to post not only for one job, one type of clerk's job, but for all types of clerks' jobs, does he not, yard clerk, train clerk, record clerk and so on?

A. Well, to get the full benefit of extra work he would have to know the different types of jobs.

Q. So that he could get called from the extra board for any one of the various types of jobs, is that right?

A. That is right.

Q. And you tell them that too, don't you?

A. I tell them that but I always start them on the simplest job, that is, the simplest duties.

Q. Does it take a week or twelve days posting for yard clerk, record clerk, train clerk and the others that you mentioned, and a week to twelve days for each one, for a man to become familiar with four or five jobs?

A. No, no.

Q. How long would it take?

A. I start an applicant out on the simplest job, yard clerk, and it would take five or six or seven days to get on to it and know every track in the yard and the many hundreds of locations, different industries around Chattanooga and the routine things like tagging and marking cars to their proper destinations, and then while he is training on that job there will be times that he can go over and sit down with the train clerk and watch him operate the typewriter and let him show him how to read a waybill. There are several different types of waybills and some of them are very difficult to read and transcribe and learn all the names, and then small duties, to go out on the yard with this yard clerk, or there is some small function the yard clerk has to perform and he will come on and say: "Buddy, we have got to go out here and tag up a cut of cars," and he goes with him and he shows him how it is done, and probably let him do a little bit of it, but the regular man is right there with him all the time.

Q. He wouldn't be doing, as Mr. Rosenhiem suggested, writing on this record that he kept as record clerk for eight hours a day?

A. No sir. Mr. Rosenhiem has never worked himself eight hours pushing a pencil.

Q. He has not?

A. No. He is not physically able to do it.

Q. Now, as a matter of fact, Mr. Born, your usual practice is to cub a man until you have got a job available, isn't it?

A. Well, 99% of the time when I let an applicant post I have got an extra board job in view for him and I tell him—I tell them all—I never fail to tell them because they have got to hit the extra board first. There have been very few occasions when I accept a messenger, a porter or a caller that I could promise them definitely that they would be assigned to a regular job, permanent job. On clerk jobs, they would have to go on the extra board after they finished their training period and qualified to the extent where we feel like we are safe in risking them to do this simple yard clerk job. After they finish their training period and a vacancy comes up, probably on a job we think they cannot hold, for instance, the important tonnage clerk's job, and he is an extra man but he is not qualified, and I put him on the yard clerk's job and the older experienced yard clerk, let the old, experienced yard clerk step up on this more responsible job because he is more familiar with it and can probably do it, and then in the course of his work, this new employee and he becomes an employee when I put him on and he is paid the full contractual rate. Then while he is working the yard clerk job he learns to take hold and picks up a lot of the duties of these other jobs. And he cometimes has a spare moment, spare minutes there when he goes over—he is on full pay at the rated job, he goes over and just watches and catches on and probably assists a little bit and learns, and in that way qualifies himself while he is being paid the full rate on the job to do a higher and more responsible class of work.

Q. That is when he is lucky enough to get on the extra board and get a job?

A. Yes, gets on the extra board.

Q. I mean when he eventually does.

A. They understand—I tell them they have got to hit the extra board until a regular job comes open that they can take and work. They are all told that.

Q. And the general practice is for them to stay cubbing until there is some opening?

A. No sir.

Q. It is not?

A. Wait a minute. I believe I interrupted you before you finished there. I anticipated your question there. They post and cub or post and train for a certain length of time, as stated before, until I feel that they are qualified. There is plenty of boys wanting off and I am in a hurry for these boys to hurry up and learn the duties of these jobs to let these boys off. We work three hundred and sixty-five days a year, three shifts, and it keeps the management working every day in the year, and they want to get off. I try to hurry these trainees up and tell them to "bear down and try to learn everything you can because there is a fellow wants off and another wants off and there will be a lot of them wanting off if you will learn this work but if you can't do it I am certainly not going to let them off and let you on there."

Q. Do you have more than one yard clerk working in the office at the same time, regularly employed or employees that are on the extra board? Do you have more than one working in the office at the same time?

A. Not that particular, what we speak of as the yard clerk job. Every clerk we have got he is, in a general sense, a yard clerk. Every clerk we have got working in the office pretty well knows the job of record clerk and yard clerk—

Q. What were you trying to say?

A. The general term for all the clerks that work in a railroad yard is yard clerk but among those numerous jobs known as yard clerks there is different duties. Like one yard clerk would do tonnage clerk work and one yard clerk would do train clerk work and one yard clerk would do record clerk work.

Q. O. k. Are there record clerks, tonnage clerks and others working in the yard at the same time?

A. Yard and offices, yes sir.

Q. And the same way in the office, there is probably more than one regular record clerk working?

A. Only one record clerk on duty in one eight-hour shift.

Q. Is there any other that knows the job?

A. Some of the older employees.

Q. So that if you put a man on there that was absolutely green there would be someone there to show him the job?

A. There would be the regular record clerk to show him the duties of the particular job.

Q. And if the regularly assigned record clerk wasn't there, there would be somebody else?

A. He would have an older employee that knew the job that could show him as good probably as the regular man.

Q. And that is true in the case of all the office trainees, there is somebody there that could show them the job if they were absolutely green?

A. A more experienced, older employee that knew the job right there to help.

Q. Two or three or four of them perhaps that knew the job who could help him?

A. Yes sir, that knows the different jobs; that is true. My train clerks and tonnage record clerks, they know all the jobs. So we have got my train clerk, yard clerk and record clerk and while they are working the tonnage clerk, if he gets in a spot, they can help him.

The Court: That is right. They are there in that work too?

A. Yes sir.

(Recess.)

By Mr. Jansen:

Q. Just one more, Mr. Born. How long have those vouchers been made out?

A. Well, the first list has been made out over two months and the last list has been made out, I believe, within the past month.

Q. For a month?

A. Within the past month.

Q. Well, about how long?

A. Well, I don't know. I haven't seen any of them.

Q. Oh, you haven't seen them?

A. No. I have the record. That is just the record of them.

Q. Well, when was it you got the record?

A. Two or three days ago.

Q. Was Mr. Rosenhiem's voucher made out when he was down there a week ago?

A. Well, I don't know. It might have been made out but hadn't been mailed to the office down there with the other checks.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Born, some mention was made of Mr. Rosenhiem having cubbed a while for the position of record clerk and then did some work, I believe, it was extra work. Wasn't it at that time somebody who had a regular job and who temporarily was off the job and Mr. Rosenhiem worked extra?

A. Yes sir.

Q. That man returned to the job and if I understand it, when he returned, of course, he picked up that job and that left no immediate job as record clerk for Mr. Rosenhiem?

A. That is right.

Q. And then you suggested, as I understood it, to Mr. Rosenhiem that he, there not being a job for him at the time as record clerk, that he post or train for job of some other clerk like the position of yard clerk so that he could qualify for that and pick up some extra work there after he had qualified. Is that what you said?

A. I believe I said I told him that he would have to learn the duties, post and learn the duties of these other jobs if he expected extra work on the clerks' jobs, to get more work.

Q. Is that what you meant when you suggested to him when he had nothing but a part-time job as record clerk that he post for some other type of clerk's job so that if there was a vacancy that he would be qualified to step in

and get work on that kind of clerk's job? Is that what you meant?

A. That is what I mean, yes sir.

Q. Now, Mr. Born, is it a fact that back sometime ago, back in the early 40's that you got some instructions from the Superintendent of the Chattanooga Division that persons who applied for positions as porters, callers, messengers or stenographers or clerks that they be paid and that you overlooked or didn't understand those instructions, is that true?

A. Yes sir, I believe we did get some instructions but just during the rush of business I overlooked them and didn't comply fully with them.

Q. Now, after this lawsuit was filed it was called to the attention of the superintendent that you had permitted persons to post for these various clerical positions without paying them the minimum of forty cents an hour, or whatever the minimum was, and that he reprimanded you for permitting those persons to post without compensation?

A. Yes sir, he did.

Q. Now, did he, after the Wage and Hour people brought up this question after their investigation and discovery that at Chattanooga a number had been permitted to post for these jobs, without pay, did the superintendent, Mr. Tucker, request your office to get up a list of those who had posted in the past and the time, as best you could, that they spent in posting and turn it in so that the Railway could go back and pay people for this posting, which Mr. Tucker evidently thought had been already paid?

A. Yes sir, he did.

Q. Did you get that list up?

A. I got the list up; got up two or three lists.

Q. And I believe you said, in getting up that list, you had some records there from which you could definitely tell the number of days that a number of these persons had posted and in reference to some of the rest of them, why, you had to depend on your memory and you discussed with some of the other clerks in the office the posting time that was spent by some of these people and that

you arrived at the time that they posted to the best of your ability?

A. Yes sir, I did.

Q. You say that there might be some inaccuracies in the report but you did get up a report of all of them to the best of your ability, the time that they spent in posting, and turned it in for the purpose of payment?

A. Yes sir. It is as nearly correct as I could get it.

Q. And I believe you stated that one list was turned early this year, about February or January, sometime earlier in the year, and then a more recent supplemental list was turned in, showing the names of people who posted?

A. Yes sir.

Q. And you do know that a large number of people turned in on the first list have already received their pay?

A. Yes sir.

Q. And that, pursuant to the second list, which was turned in more recently, that vouchers have been issued covering the names of all those people?

A. Yes sir.

Q. That were turned in?

A. Yes sir.

Q. And did you turn in everybody that your records showed had given work or had posted there?

A. Yes sir, a complete list has been sent in.

Q. You said something about making some kind of check in the last two or three days. Did you make that over here in the accounting department of the head office at Nashville?

A. Yes sir, I had to get that.

Q. Is that where you found out that Mr. Rosenhiem's check had already been issued?

A. Yes sir.

Q. And Mr. Prince's check had been issued?

A. That is information coming from the general offices here.

Q. Did you find out from your investigation that those checks have gone out, have been issued?

A. Yes sir.

Q. Now, whether or not they have been delivered, all of them, you don't know?

A. No sir, I don't know.

Q. Now, when this was called to Mr. Tucker's attention that those people who posted back before this suit was filed had not been paid and no fixed record back there or detailed record of the time of posting had been kept except on loose sheets, some of them being lost, did you have instructions to, and have you since that time, and are you at the present time keeping accurate records or the Company keeping accurate records of the names of persons posting, the days and the hours of posting, and also keeping record of them for the purpose of making payment equivalent to the minimum provided by the Wage and Hour Law?

A. Yes sir, that is being done.

Q. Now, whether those payments that have been made, those back payments that have been made, were made as wages or made as a gift or made as compensation, that list has been furnished and the Railroad has gone back and issued vouchers for everyone of them, so far as you know?

A. Yes sir.

Q. Isn't that the truth?

A. That is the truth.

Q. And you are keeping those records now of every hour every day that a person posts and they are being currently paid for their time while posting?

A. Yes sir, I don't keep all the records.

Q. Well, those records come in and come to the accounting department, don't they?

A. Yes sir, they do.

Q. And those checks come from the accounting department based upon the days and the hours of each day that a person posts?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes sir.

Q. And so far as you know, is it not a fact that it is the intention of the Railroad Company, in good faith, in

the future to keep these records and make payments in compliance with the Wage and Hour Law?

A. Yes sir, that is my understanding that it is.

Q. These persons, while posting, Mr. Born—say the position of yard clerk—is it not true that they get their training under the instructions and observation of a regular yard employee who tells them and shows them and also lets them do part of this work from time to time and then checks their work to see if they have done it right?

A. Yes sir.

Q. So far as you know, does any person, while posting for any of these clerical jobs, do anything in any way that there is not a regular man there to do and paid to do?

A. No, there is not. There is a regular man right there and it is my instructions to this regular man to always go with this trainee or this applicant and if they go outside of my sight and permit him to perform some little duty in connection with the job, why, it is without my consent.

Q. Now, if Mr. Prince, when he started training for this yard position as yard clerk, if he trained two days with a man and then took over and ran the railroad for more than five weeks you don't know anything about that, do you?

A. No. Mr. Prince couldn't memorize the tracks in two days.

By Mr. Jansen:

Q. Mr. Born, one of the questions that Mr. Whitwell asked you was whether or not it was the intention of the Railroad to comply with the Wage and Hour Act in the future. Did you say it was?

A. I said that it was my knowledge that it was.

Q. Is it your understanding that the Railroad admits that these posting and cubbing porters and the rest are employees?

Mr. Whitwell: We will take care of that. That is a legal question. Our answer states our position.

The Court: Yes sir. I think you are asking for a conclusion now.

By Mr. Jansen:

Q. Have you got a man by the name of Webb on your list?

A. No sir, not now—oh yes—

Q. How much are you paying him?

A. I believe three days posting.

Mr. Jansen: Counsel, am I to understand that these people working in the office, that you admit that these people working in the office are employees of the Railroad when they are cubbing or training or posting?

Mr. Hunt: I think our answer states that the management determined and elected to treat these posters as employees and gave instructions that they be compensated and treated as employees. Now, that was past and present instructions but on that phase of the case, if we are correct, it requires no determination that they are not employees. The situation has developed here, whether we elected to treat them as employees or not, if the Court thinks that we were not making payment it, of course, would have to make the determination they are employees and were not compensated. But it has been the position of the Railroad that those posters might—it always recognized the possibility that posters might perform some beneficial service and it elected to treat them as employees. Its management gave the superintendents instructions to that effect and they gave them to various other supervisory officials but at Chattanooga that was not done, that is to say, they were not treated as employees and record kept and the moment that came to the attention of the management that situation was corrected at Chattanooga. Does that answer it?

Mr. Jansen: No, it does not. I asked you if you admit that these people who were cubbing in the office were employees of the Railroad.

Mr. Hunt: And we stated that the management elected to treat them as employees and subject to the Act and comply with the Act for this purpose.

Mr. Jansen: Then you don't admit, without qualification, that they are employees?

Mr. Hunt: We don't admit that they are employees.

Mr. Jansen: You don't admit that they are employees, under the Act?

Mr. Hunt: No.

Mr. Jansen: That is all I wanted to know.

The Court: Of course, if they are complying with the Act it doesn't make any difference whether they admit that or not because, even assuming that they are employees, if they comply with the Act, that is the end of the story.

Mr. Jansen: I feel that we can be prepared to argue that point when it comes time to, if the Court please.

The Court: Have counsel both finished with this witness?

Mr. Jansen: Yes sir.

By the Court:

Q. Now, that I may be sure to assess your testimony correctly, as to these non-operational employees—clerks, stenographers, messengers—posters, you call them, does the defendant Railway Company pay all of these people during their training period 40 cents an hour now?

A. Yes sir.

Q. How long has that been in effect?

A. Well, I can't say exactly but some time this year.

Q. Except as to the Chattanooga situation, now, how long has it been in effect?

A. Well, I don't know what the conditions are at all the other parts of the system, in other terminals, but I do know we are paying it there in our Chattanooga terminals now.

Q. How long has it been in effect in Chattanooga?

A. Well, for several months; sometime since, I believe, the first of the year.

Q. Even though you don't concede that they are em-

ployees, you are paying all these persons not less than 40 cents an hour during that training period?

A. That is right.

Q. Is that also true on the remainder of the system, on the rest of the system?

A. I wouldn't have the remainder of the system. I don't know what the uniform practice is.

Q. But you do know it is true and has been for several months at Chattanooga?

A. Yes sir.

Q. As to these trainmen employees, switchmen, brakemen and firemen, do you pay them $5.00 a day during their training period, provided they don't quit of their own accord?

A. That is my understanding.

Q. You say that is your understanding. Is that because you—is that true?

A. I don't have any jurisdiction of it.

Q. Oh, that is out of your department. You only have posters?

A. Only the yard office clerks, porters, messengers and callers.

Further this witness saith not.

The next witness, W. E. REDMOND, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. William Earl Redmond.

Q. How old are you?

A. Thirty two.

Q. Where do you live?

A. Chattanooga, Tennessee.

Q. How are you employed at the present time?

A. In the retail grocery business.

Q. Have you ever been employed with the NC&StL Railway?

A. I have.

Q. And when was that?

A. Approximately from the first week in January, 1943 until about the middle of July, 1944.

Q. During that time that you were employed or that you were at the NC&StL Railway were you required to do any free cubbing without compensation?

A. Yes sir, I was.

Q. How many days did you cub without compensation?

A. Five days.

Q. What kind of job did you work on with the NC&StL Railway?

A. Yard fireman.

Q. And you were required to cub, you say, five days without compensation for the job of fireman?

A. Yes sir, I was.

Q. And then after you cubbed you went on the extra board, did you?

A. Yes sir.

Q. And worked along as extra man until July?

A. Well, no, later on I got a job as seniority permitted.

Q. And you worked along down until July?

A. Yes sir.

Q. Now, can you describe a little bit in detail just what you did when you were cubbing as a fireman?

A. Well, I went to work with the regular fireman and he showed me and instructed me in the duties of a regular fireman. And then he permitted me to take the job over myself and try it and he would show me my faults, show me how to do it and then let him take over again.

Q. What time of the day did you start your cubbing?

A. My first shift started, the first day I cubbed was approximately 3:30 in the afternoon, or maybe 4:00, one or the other.

Q. How long did you cub?

A. I cubbed until 10:30 that night.

Q. And the next day what time did you start?

A. 6:30 a. m.

Q. How long did you cub?

A. I cubbed straight through until 6:30 the next morning.

Q. Did you cub a full shift each of the five days?

A. With the exception of the first one. They had been working some hour or an hour and a half. The job went out at 2:30 and I didn't go down there until about 3:30 or 4:00.

Q. Who told you where to go and what to do?

A. No one. Mr. Tommy Johnson—

Q. Who was he? Who is Tommy Johnson?

A. He is, I believe his title is chief clerk under Mr. T. C. Burton in the master mechanic's office. He gave me a slip of paper to be signed, authorizing me to ride the engines and to be signed by the regular fireman or engineer, or both.

Q. Did he tell you who to go with?

A. No, he didn't. He told me to go with anyone I wanted to. He only specified four different jobs for me to cub.

Q. How did he specify the four different jobs?

A. It seems there is a difference in the four different jobs and he wanted me to—

Q. What four jobs are those?

A. Well, one is firing the Diesel, steam engine—I mean the Diesel switch engine. Another is hostler helper, shop; another one is hostler helper, what they call the outside job, which is carrying passenger engines to the job and back to the shop. Another one is firing steam switch engine.

Q. And he told you that you would be required to cub all four of those jobs at one time or another during your cubbing period, did he?

A. Before I could go on the extra board.

Q. Did he tell you what time of the day to start?

A. No.

Q. How did you decide what time of the day to start?

A. Well, after I passed my medical examination I asked him where I should start or any particular one. He says for me to go out and take any one I wanted to at any time and work as long as I wanted to.

Q. Did you work eight hours?

A. The first day?

Q. I mean outside of that first day?

A. Yes sir, I did.

Q. What did you do when you were cubbing?

A. I rode with the regular fireman, learned the switches, learned the signals and learned the duties of a fireman in the operation of a Diesel engine.

Q. What duties are those?

A. There are some two or three valves to be turned on every hour and keep a watchout mostly for safety.

Q. What did you do on the steam engine?

A. On a steam engine practically the same duties. Of course, you have to keep watch up there for the crew and clean the deck.

Q. Shovel any coal?

A. Shovel plenty of coal, yes sir.

Q. How much of your time during the eight hours was spent in shoveling coal,

A. I imagine at least 50% or 60% of it anyway.

Q. How many days were you on a steam engine?

A. I was only on that one day cubbing.

Q. Did you do the same kind of work after you got through cubbing as you did while you were cubbing?

A. Yes sir.

Q. Was there any difference in the duties after you got through cubbing and the duties while you were cubbing as fireman?

A. No sir.

Q. You mean they were the same?

A. Yes sir.

Q. Except that you had someone with you when you were cubbing, is that right?

A. That is right.

Q. Now, the job of hostler helper, that is the job of bringing engines in and out of the roundhouse, isn't it?

A. Yes sir.

Q. What do you have to do in connection with engines when you would bring them out of the roundhouse?

A. Well, I had to make them ready for the road; had to first test and get sand and then coal, fill the water tank and then between the hostler and I, we see that the fire was in proper condition. Then take it from the shop up the engine lead to the terminal station and when a train

came in we would take the engine off of it and put the fresh engine on.

Q. And did you do that work while you were cubbing?

A. Yes sir, I did.

Q. While you were cubbing as hostler helper?

A. Yes sir.

Q. Did you have to fill the sand dome or whatever it is?

A. Yes sir.

Q. And this other work that you have described?

A. Yes.

Q. Did you ever get any pay for the time you spent cubbing?

A. No.

Q. Did you ever receive any?

A. No sir.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Redmond, I believe you say you went to work or got a job as yard fireman in January, 1943?

A. I believe that is right, approximately about that time.

Q. And you worked on that job until July, 1944?

A. I believe that is right.

Q. And then you quit?

A. Yes sir.

Q. And I believe you say you are working now at a grocery store?

A. Yes sir.

Q. Now, Mr. Redmond, you have been asked some questions about what you did while you were learning this job. Your cubbed with a regular fireman on each engine that you cubbed on, didn't you?

A. Yes sir.

Q. And the fireman of that engine, a regular employee, he told you the different things about the layout of the yard—you had to know that, didn't you?

A. Yes sir.

Q. You had to know the location of the switches and you had to learn a lot about signals, didn't you?

A. Right.

Q. And you had to learn a number of different tracks that you would go in and out?

A. That is right.

Q. You had to learn the location of industries where you would spot cars or pick up cars, is that right?

A. Well—

Q. You were strictly in the switch yards, not a passenger man?

A. That is right.

Q. I see. And you had to learn the different parts of this locomotive like the water gauge and how to fire the locomotive properly and keep from having too much smoke and have enough steam and not damage any of those different things?

A. That is right.

Q. Now, the regular fireman, he took pains with you and taught you those things, didn't he?

A. He did, yes sir.

Q. And after he had taught you those things, including the location of tracks and various things, he would then let you shovel in coal and learn the job, didn't he?

A. That is right.

Q. And that is the best way you know of learning a job quicker and faster, by doing it yourself?

A. I think so.

Q. And he would be standing there, watching you and telling you how to do that, wouldn't he?

A. Right.

Q. Did you do anything in connection with your cubbing for the position of fireman that the regular fireman was not there to do and paid to do?

A. No.

Q. Were you cubbing for your own benefit to learn the duties of the job that you wanted?

A. Evidently, yes sir.

Q. Did you have any control over the operation of that engine or any of its switching operations at all?

A. No, only the firing, and the water gauge, is all.

Q. Looking at those things in order to learn?

A. That is right.

Q. What I mean about that, you were not held responsible for the movement of that locomotive or anything like that, were you?

A. I don't think I was, no sir.

Q. That was the duty and responsibility of the crew itself, wasn't it?

A. That is right.

Q. You understood that, didn't you?

A. Yes sir, I did.

Q. When you first made out your application you understood that you wouldn't be paid during the time that you were cubbing for the job that you were seeking, is that true?

A. I was told that I wouldn't be paid.

Q. Wouldn't be paid?

A. Yes sir.

Q. And I believe you said you were not paid?

A. No sir, I was not.

Mr. Whitwell: In this connection I wish to call the Court's attention to our answer in which we freely admit that prior to December 1st, 1943 persons were not paid anything and this gentleman cubbed prior to that date, so our answer is clear as to our position why he wasn't paid.

Q. When you went on the seniority roster after—that was after you had completed your cubbing, wasn't it?

A. Yes sir.

Q. And when you went on the board that was after you had completed your cubbing?

A. Yes sir, it was.

Q. And you considered that your employment started after you had completed your cubbing?

A. Yes sir.

Q. Now, Mr. Redmond, what was your rate of pay which you received the first day you worked as an employee?

A. I don't remember exactly. I believe it was $6.59 or something like that. It has been raised since then.

Q. But you did draw, the first day you worked, the same contractual rate of pay that the other firemen employed in the yards drew, the same thing, didn't you?

A. According to the job I worked on. Each job has a separate certain rate of pay.

Q. According to your job, you drew the same rate of pay and the same wages, whatever you want to call it, that other men working that job drew who had probably been there ten years, is that true?

A. That is right.

Further this witness saith not.

Mr. Jansen: May I inquire of the Court what the Court's pleasure is about adjourning? I wanted to determine about what witnesses I should call.

The Court: It will be just about forty seconds until we adjourn. Call the last witness, the chief clerk. I want to ask him a couple of questions and then we will adjourn.

J. E. BORN, recalled for further examination, testified as follows:

By the Court:

Q. As to these posters, so called, who would post for a while and then come back, you have prepared pay vouchers for them all based on the rate of pay required by the Act here in question, the Wage and Hour Law?

A. Yes sir, they have prepared vouchers for them.

Q. About what proportion of them have been delivered and what proportion are undelivered?

A. Well, I don't actually pay these men these vouchers, checks, but the first list that came out I am pretty well familiar with because I talked to the paymaster there that had the checks. I delivered some of them myself and I would say about 75% of the first list has been delivered. In some instances—there are several of the boys overseas and some—

Q. Are you certain that pay vouchers have been prepared for them all?

A. Yes sir.

Q. Why didn't you mail them out to them?

A. It is against the Company's policy to mail a man his

check, as I understand it, unless he gives his written permission to do so because they change their address so much.

Q. As to these undelivered ones, they are on hand waiting for the former posters or men involved to come and get them?

A. Yes sir, and as soon as we can find out where we can locate them we try to notify them that there is a check waiting for them.

Q. How far back does that go? How far back did you go in writing these checks?

A. October, 1940. I believe that is correct.

Mr. Jansen: I would like to ask him one question.

Q. Have you included liquidated damages for an equal amount of these checks that you are giving in these cases?

A. Just what do you mean?

Q. Double damages. Are you giving them an extra amount?

The Court: No. I think we all understand they are just—

By Mr. Jansen:

Q. Just for this amount of forty cents an hour, is that right?

A. That is the way I understand it.

Further this witness saith not.

The Court: We will take a recess now until 10:00 in the morning. I want everybody to be punctual and be ready and have your next witness on the stand at 10:00 o'clock.

Thereupon Court adjourned until 10:00 in the morning.

On Thursday, May 17th, 1945 Court convened pursuant to adjournment, when the following proceedings were had:

Mr. Jansen: If it please the Court, at this time we wish to offer the deposition of John Harrison Whitten, who was general yardmaster of the Chattnooga Terminals, who has jurisdiction over the Chattanooga Terminal and who has

the power to hire and fire employees, and we offer his deposition as the deposition of an adverse witness. Now, I might point out to the Court that we haven't subpoenaed Mr. Whitten but I think I see him in the courtroom. However, we think that first of all we have the right to offer the deposition; secondly and more important, we think that it will save a lot of time if we are permitted to go along and read the deposition rather than to take up the time to examine him all over again.

The Court: I am more impressed with your second reason than with your first. Is there any objection to this deposition?

Mr. Whitwell: No.

The Court: I want counsel to understand that I wouldn't permit a deposition to be read of a witness who was sitting right in the courtroom if there is any objection but if there is not and it will save time, we will go ahead with the deposition.

Mr. Jansen: I am convinced it will save time, your Honor and I would like to ask that Mr. Cadra, my associate, be permitted to read the deposition.

The Court: All right.

(Deposition of John Harrison Whitten read.)

The next witness, CARL DURWOOD EASON, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Carl Durwood Eason?
A. Yes sir.
Q. How old are you?
A. Thirty four.
Q. Where do you live?
A. Chattanooga, 4400 Kirkland Avenue.
Q. How are you employed at the present time?
A. I work at the Hecules Powder Company.

Q. Were you ever employed with the NC&StL Railway?

A. Yes sir, I worked a year and twenty three days with them.

Q. Now, what kind of work did you do before you went with the NC&StL Railway?

A. I worked for the Hercules Powder Company, switching.

Q. You mean you had done switching for the Hercules Powder Company?

A. Yes sir, before I went with the NC&StL Railway.

Q. How long have you been with them, Mr. Eason?

A. I will say, just on a guess, about twelve or fifteen months, I think.

Q. Is there any difference in the actual switching work, outside of the layout of the yards and things, between the work you did as switchman at the Hecules Powder Company and the work you did as a switchman at the NC&StL Railway?

A. Yes sir. You don't have any main line trains to look out for at the Hercules Powder Company. It is all switching out there but you have to work trains on the north and south end of the NC&StL Railway.

Q. You mean you don't have main line trains to work with over there?

A. No sir.

Q. And you have a different layout of the yards, switch tracks and so on?

A. It is practically the same thing; it is all railroad yards.

Q. The actual physical work, is there any difference in that?

A. No.

Q. Now, before you started drawing pay from the NC&StL Railway were you required to go through a cubbing period?

A. Yes sir, I cubbed four days.

Q. Do you recall how much you cubbed each day?

A. Well, when I first hired Mr. Whitten told me I could either cub eight hours and make $5.00 or I could cub sixteen hours and make $10.00, so I doubled over two days,

making sixteen hours in two days and I worked eight hours the other two.

Q. And were you told where to go and when you were to cub?

A. Yes sir, they told me what crew to cub with.

Q. Who told you that?

A. The general yardmaster.

Q. What did you have to do as a cub?

A. Well, practically the same thing as switching. You had to learn the yard and your switch leads and how to bring an engine out from the shop to the job.

Q. Did you do any work as cub?

A. Yes sir.

Q. What did you do?

A. Well, after about the first couple of hours over there I did the switching just as if I had been on the board at that time.

Q. What part of the train were you on, the front end?

A. I was working with the engine, yes sir.

Q. Is that what you call the tailboard job?

A. That is the footboard.

Q. Was there somebody else on the footboard job?

A. Well, the biggest part of the time, yes sir.

Q. What would he be doing while you would be working switching?

A. Well, he would just stay on the engine. Lots of times he would get off and stand around where we were switching.

Q. Who threw the switches and coupled the cars and uncoupled them and cut them off and so on?

A. The footboard man and myself both. We were taking time about.

Q. You mean you would change about?

A. Well, some, yes sir.

Q. And you did all that work while you were cubbing in the yards?

A. Yes sir.

Q. How many different jobs did you work on?

A. I worked on all seven jobs. There are seven on each shift.

Q. So did you work seven different shifts?

A. Yes sir.

Q. And on two days you doubled over?

A. I didn't work seven different shifts. On the north end, I think I worked about two and a half or three hours down there and the foreman told me, he said, you can go ahead and cub on another job today because, he says, you know this job enough to get by with it.

Q. Who told you where to go then from there?

A. Well, I came back to the yard office and I worked the south end then the rest of the day.

Q. Who told you where to go?

A. Mr. Whitten.

Q. Did you speak to Mr. Whitten and he told you to go to the south end?

A. Yes.

Q. Now, did you ever get paid for the time you spent cubbing?

A. I got paid the eight hour days but I didn't get paid for the sixteen hours. He said that they had orders from Nashville that they couldn't pay but just for eight hours in one day.

Q. How many of these eight-hour shifts didn't you get paid for?

A. I would say three altogether. I was put on the board, I went to work at 2:30 and 10:30 and I was put on the board at 10:30 that night and I worked until 6:30 the next morning; and then doubled over again from 6:30 to 2:30 the next day.

Q. There was twenty-four hours continuous work there; counting in the eight hours cubbing, you worked a continuous shift of twenty-four hours, counting the eight hours cubbing?

A. Yes sir.

Q. You had started at 2:30 cubbing and cubbed that eight hours and then went on the board and worked for sixteen hours?

A. Yes sir.

Q. But you didn't get paid for the eight hours which you had cubbed?

A. That is right.

Q. Did you talk to anybody about that?

A. Yes sir. I was pretty sore about it and I went to the chief clerk and asked him.

Q. Who was that?

A. Johnny Born. I said, "I didn't get paid for the eight hours." He says: "Man, you are crazy. We couldn't afford to turn in a slip like that, you working twenty-four hours." He said: "I tore the slip up myself." I said: "Who gave you authority to tear it up?" He said he just couldn't turn it in.

Q. What did he mean, you couldn't work twenty-four hours?

A. There is a sixteen-hour law on the railroad and you are not supposed to work over sixteen hours.

Q. After you had finished this eight hours cubbing, starting at 2:30 that afternoon, were you told to report on these other jobs after you were on the extra board?

A. I didn't get your question.

Q. Who told you to report for extra work this last sixteen hours?

A. Mr. Whitten. They called me that night and told me that I would be put on the extra board at 10:30.

Q. Were you out cubbing at the time they told you that?

A. Yes sir.

Q. And they kept you working then a continuous shift of twenty-four hours?

A. That is right.

Q. And the first eight hours of that shift you were never paid for?

A. No.

Q. And then there were two other days?

A. Yes sir, when I made sixteen hours two days. They paid me for eight hours each day.

Q. Two different other days when you had worked two eight-hour shifts and they paid you for only one?

A. That is what I was cubbing, yes sir.

Q. How much did they pay you for this cubbing?

A. $5.00 a day.

Q. All the others that they paid for?

A. Yes sir.

Q. By the way, Mr. Eason, after you finished your cubbing did you have to take any kind of examination before you were put on this extra board?

A. No sir, I was put on the extra board but afterwards we did have a rule examination, I might say, about thirty days later.

Q. You were on the extra board working?

A. I had worked up to the time.

Q. During the time, from the time that you finished your cubbing and you spent those eight-hour shifts on the extra board, you worked pretty regularly, did you, up to the time when you took the examination?

A. Well, I made anywhere from, I will say, ten days to seventeen or eighteen days a half, something like that.

Q. And that was thirty days later that you took the examination?

A. I wouldn't be positive but just approximately.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Eason, you say you worked as a switchman for the Hercules Powder Company before you made your application to the NC&StL Railway for position as switchman?

A. Yes sir.

Q. As a switchman for the Hercules Powder Company were you working with a crew with a steam locomotive?

A. No sir, we had Diesels.

Q. Is the Hercules Powder Company yard, is it the same yard or different from the—it is not the same yard as the NC&StL yard, is it?

A. No sir, it is a smaller yard, capacity there. They don't handle as much trains as the NC&StL Railway does.

Q. How much experience did you say you had had at the Hercules Powder Company and that operation switching before you came to the NC&StL Railway?

A. I said approximately twelve or fifteen months, I think.

Q. Now, while you were working with the Hercules Powder Company I take it that you learned quite a bit

about signals and about throwing switches and things like that in connection with yard operations?

A. Yes sir.

Q. So you had quite a bit of experience in switching in another yard before you came to the NC&StL Railway and filed your application?

A. Yes sir.

Q. Now, why did you make your application with the NC&StL Railway for position as switchman?

A. Well, at that time there was a reduction in force and I was going to be laid off and I filed application for a job with the NC&StL Railway.

Q. I don't recall whether you told me when you did your cubbing with the NC&StL Railway. When was that?

A. I was hired, I got an application January 5th and I believe started my cubbing on the 6th.

Q. Is that 1940?

A. 1945.

Q. Now when you made your application January 5th, 1945, did you talk with Mr. Born at that time or was it Mr. Whitten?

A. No sir, I talked to Mr. Whitten.

Q. Did you tell him at that time that you had had this prior experience with the Hercules Powder Company switching over there?

A. When I asked for the job I asked for a job switching. I don't believe that I mentioned that I was working with the Powder Company but I am pretty sure that he knew I was with the Powder Company.

Q. He knew you had had prior experience over there switching for the Powder Company?

A. Well, I imagine so, yes sir.

Q. Now, when you made this application you didn't understand that you were then an employee, did you?

A. Well, I figured I was employed when he gave me that application.

Q. You figured that filing the application employed you?

A. Yes sir, when I passed the physical examination.

I gave him my application, passed the physical and brought it back.

Q. Did he tell you then that you would have to go through a cubbing period to learn the yard?

A. Yes sir, he did.

Q. So you didn't consider that you were employed while cubbing, did you?

A. Well, I imagine so because I was working with the NC&StL Railroad.

Q. So you just thought you were employed from the time you signed that application, is that right?

A. Well, according to the way the seniority roster runs there. A boy they hired in the meantime, I had an application ahead of him and my seniority on the seniority roster was ahead of him.

Q. What seniority roster are you speaking of?

A. Seniority with the Railroad.

Q. What do you know about how that seniority list is made up and who makes it up?

A. Well, the seniority roster is made up by the Railroad Company and it is posted.

Q. Why, isn't it a fact that the seniority is made up by representatives of the employees' organization?

A. No sir, it is made up by the Railroad Company.

Q. Now, Mr. Eason, were you told when you made that application that you would have to go out on certain different parts of the yards and cub or train with the regular crew there in the yards, learn the location of the yards, switches and things like that?

A. Yes sir.

Q. You understood that all during your cubbing period you were out there for the purpose of learning the duties of a job that you were seeking? That is the truth, isn't it?

A. Well, to a certain extent, yes sir. I was learning the location of the tracks which different cars went in.

Q. And you went along with the crew that had regular switchmen, didn't it?

A. Yes sir.

Q. And you had two ground men, two ground switchmen, didn't you?

A. Yes sir, we have got a field man, footboard man and a foreman.

Q. And you had a conductor and an engineer?

A. Well, the foreman is counted—that is the conductor in the yard.

Q. Well, you had an engineer and fireman in addition to the foreman and two switchmen, didn't you?

A. Yes sir.

Q. Now, either the foreman or one of these switchmen or both would tell you, give you lectures or instructions as to the location and layout of the yards, wouldn't they?

A. Yes sir.

Q. And instructions as to the Company's signals that were regularly used there and given between the parties?

A. Well, they used standard signals. All railroads practically use the same signals.

Q. Now, what do you know about what signals—what kind of signals the Southern Railways uses?

A. Well, the rulebook is the same. You take an examination out of it and it has hand signals and lantern signals in there for the yard.

Q. Have you made a study of the rulebook of the Southern Railway?

A. Well, I have seen it. I have never studied it all the way through but it is a standard rulebook.

Q. When did you see it?

A. I couldn't tell you just exactly because I have seen rulebooks for quite a few years.

Q. Did you see those rulebooks of the Southern Railway before you came to the NC&StL Railway and made application or after you made application?

A. Well, I couldn't say that the book came from the Southern Railroad but each railroad uses the same book.

Q. Now, how do you know that?

A. There is standard signals, a standard rulebook.

Q. You know that the Illinois Central uses the same signals in their switch yards that the NC&StL Railway uses in its switch yards?

A. Well, they use standard signals.

Q. How do you know that?

A. I don't know.

Q. What makes you say it then?

(No response.)

Q. Sir?

A. It is a standard rulebook. Every railroad operates on standard rules.

Q. Where did you get that information?

A. Out of the rulebook.

Q. What rulebook?

A. The standard book of rules.

Q. You say that you have seen a standard book of rules that applies to railroad operations of every railroad in the United States, is that right?

A. Well, to my estimation, yes sir.

Q. Your estimation. Upon what do you base that estimation?

A. On the standard book of rules.

Q. Well, we come back to it. What made that book of rules standard?

A. I imagine it was drawn up for every railroad to operate by.

Q. All right. Now, you did understand, Mr. Eason, that you were out there, before you went on the seniority roster, that you were out there to learn the duties of the job for which you made application, didn't you?

A. Yes sir.

Q. And you understood that it was necessary for you to cub and learn those duties before you ever went on the roster of employees, didn't you? Tell me the truth.

A. Before I went on the board, yes sir.

Q. You understood that before you went on the board and went to work as an employee after going on the board that you would not draw the regular contractual rate that is applied to a switchman's job, didn't you?

A. For the cubbing period, $5.00.

Q. You knew, while cubbing, you wouldn't draw the regular rate that applies to employees after they qualify and are employed?

A. Yes sir.

Q. You knew that?

A. I knew I wouldn't get the standard rate of pay, yes sir.

Q. And you knew that you were out there training with a full crew, didn't you?

A. Yes sir.

Q. And you knew you were out there to learn in order to qualify for this, to qualify yourself to become a regular employee, didn't you?

A. That is right.

Q. And you knew you had to do this cubbing to learn the yards and these different things and practices, didn't you?

A. Yes sir.

Q. And you were shown those things and taught those things by members of that regular crew while you were cubbing, weren't you?

A. I was taught the markings of the cars, yes sir, and the tracks.

Q. You were shown how to throw the switches and where they were?

A. I knew how to throw them.

Q. It didn't take you long to catch on to that?

A. That is right. I only cubbed four days. I don't think it took me long.

Q. Now, during the period of your cubbing did you do one solitary thing in connection with your cubbing that the regular men were not there and paid to do?

A. The regular men was there but I switched.

Q. Well, in other words, if you hadn't been there the things you did would have been done by the regular men, wouldn't they?

A. That is right.

Q. Do you know anything that you did in connection with your training that wouldn't have been done by the regular men if you had never come there?

A. No sir.

Q. And the things that you did while you were cubbing were things that they were there to do and paid to do, weren't they?

A. That is right.

Q. Did you have a single, solitary duty or were you chargeable with a single, solitary duty or responsibility

in connection with the movements of that engine or any railroad operation while you were cubbing?

A. I wasn't responsible for it, no sir.

Q. That responsibility was with the crew, wasn't it?

A. That is right.

Q. Now, you say you cubbed the first day January 5th, is that right?

A. Now, from the best of my memory, I left the Hercules Powder Company on the 4th and I made application on the 5th and I believe it was the 6th that I started my cubbing.

Q. And you cubbed at various places in the yards for your own benefit to learn the duties of the position for which you had applied in the yard, didn't you?

A. Yes sir.

Q. And you said something about you were paid $5.00 a day for your cubbing. Now, you cubbed how long, you say, the first day?

A. Sixteen hours.

Q. Now, you cubbed sixteen hours that day in order to learn the yards quicker so that you could go on the roster of employees quicker, didn't you?

A. Yes sir. I worked and learned the job and to make the extra $5.00 too on that.

Q. You learned, of course, before you came down there that the Railroad was paying $5.00 a day to cubs while they were cubbing, didn't you?

A. No. I didn't think they paid anything. I applied for the job and Mr. Whitten told me Tommy was allowed to pay $5.00 a day.

Q. That they were allowed to pay you $5.00 a day during the period of your cubbing?

A. Yes sir.

Q. You knew that that wasn't the rate you would get after you became an employee, didn't you?

A. Yes sir.

Q. And you cubbed those sixteen hours on one or two different days for your own benefit to learn quicker how to get to your job that paid more than $5.00? That is the truth, isn't it?

A. Yes sir.

Q. And you knew the sooner you got through with your cubbing you would become an employee and draw this contractual rate of pay, didn't you?

A. I knew just as soon as I completed my cubbing I would be put on the board as a switchman.

Q. And draw this regular switchman's rate?

A. Yes.

Q. Now, the regular switchman's rate doesn't apply and is not paid to a person while cubbing, is it?

A. No.

Q. Do you know what that is?

A. Well, I imagine because he is not a qualified switchman.

Q. Isn't it because he is not an employee until he gets upon the roster of employees?

A. Well, I don't know about that.

Q. And haven't you learned, Mr. Eason—

Mr. Jansen: May it please the Court, I think that last question—I haven't stopped counsel up to now, but I think that is highly argumentative.

Mr. Whitwell: I don't think so.

The Court: This is cross examination. Overruled.

Mr. Jansen: All right.

By Mr. Whitwell:

Q. —and if you didn't know it then, didn't you learn it soon afterwards, that the regular rate of pay which is paid to an employee after he comes upon the roster is more and different from the amount that the Company pays to persons while cubbing?

A. Yes sir, it is more than the cubbing pay is.

Q. Didn't you learn, if you didn't know it beforehand, that your standing on the board or on the seniority roster of employees did, at least for some period, begin some period after you had completed your cubbing?

A. Well, my seniority started on the 9th on the roster.

Q. Started on the roster on the 9th. Well, it was after you had completed your cubbing, wasn't it?

A. Yes sir.

Q. And you cubbed four days?

A. Yes sir.

Q. And you were paid $5.00 a day for four days, weren't you?

A. Yes sir. I cubbed four straight days, but I worked sixteen hours two days. It amounted to six days cubbing, that is, eight-hour days.

Q. But anyway, regardless of the number of hours that you cubbed in any one day, you cubbed four days and were paid for four days, weren't you?

A. I was paid for four eight-hour days.

Q. You were told when you started cubbing that you would be paid $5.00 a day for cubbing?

A. I was told I would be paid $5.00 for eight hours, or I could work sixteen hours and make $10.00, but I later found out that the Company didn't allow them to pay more than eight hours in one day.

Q. You later found out that the information given you there as to the sixteen-hour days was an error and that the Company did not allow $10.00 a day instead of $5.00, is that right?

A. I imagine Mr. Whitten misunderstood about that. He was honest in his opinion, but the Company didn't allow it.

Q. And so you got paid for all that you understand the Company allowed under its policy of paying $5.00 a day?

A. Yes sir.

Q. And you say you got mighty sore?

A. Yes sir, it made me sore when I doubled over there two days there and didn't get paid for it.

Q. Or did you quit?

A. No.

Q. Are you working for the Company now?

A. No sir, I work for the Hercules Powder Company.

Q. What brought about your severance from the Company?

A. Well, the foreman and myself got into a stir and he cursed me and I hit him and they discharged me.

Q. You are the man that got into a fight up there and hit the foreman?

A. Yes sir.

Q. How long had you been working for the Company before you hit that foreman?

A. I was fired out of the service at 2:15 on the 23rd of January and that made me twelve months and twenty-three days.

Q. Now, that man that you hit was an old man, old man Hamblen?

A. No sir.

Q. Who was it?

A. George Norvell.

Q. What age man is he?

A. Well, I don't know his age.

Q. Well, give us some idea. I am just curious to know.

A. Well, I would say around, I imagine pretty close to fifty years old.

Q. Fifty years old?

A. Yes sir.

Q. What was your age at the time?

A. Thirty-four.

Q. Thirty-four. Was he a smaller man or larger man than you?

A. He was smaller than I am.

Q. About what would he weigh?

A. I imagine about a hundred and forty or forty-five, something like that.

Q. How much do you weigh?

A. Two hundred and twenty.

Q. Now, before you were discharged for hitting that old man were you given notice of a hearing?

A. Yes sir.

Q. Did you understand that you, as an employee, were entitled to a hearing under the agreement between the Company and its employees?

A. Yes sir.

Q. Were you given a hearing?

A. Yes sir.

Q. Did you appear at your hearing?

A. Yes sir.

Q. Were you told that you might have a representative of your own choosing there?

A. If I wanted it, yes sir.

Q. Did you want it?

A. No sir.

Q. You represented yourself at the hearing?

A. Yes sir.

Q. Did you admit at the hearing that you hit this old man?

A. Yes sir.

Q. Were you discharged after that hearing?

A. Yes sir.

Q. Did you appeal from that notice of discharge or the action of the Company in discharging you? Did you appeal to the General Manager or to the National Railroad Adjustment Board in Chicago?

A. I went to Mr. Tucker's office three or four times and I didn't never get to talk to Mr. Tucker. I didn't go to Mr. Hale.

Q. I am asking you if you appealed?

A. I appealed to the Brotherhood, yes sir.

Q. You appealed to the Brotherhood?

A. Yes.

Q. Did the Brotherhood appeal to the National Railroad Adjustment Board?

A. I think it was the general committee.

Q. Appealed to a committee?

A. Yes.

Q. You never did go to the National Railroad Adjustment Board with your appeal or claim, did you?

A. I don't know. Mr. Thacker was handling that.

Q. Do you know whether the claim was ever filed with the National Railroad Adjustment Board asking that you be reinstated or that you were wrongfully discharged?

A. Well, I had a letter from Mr. Thacker stating he had appealed to this committee.

Q. This railroad committee?

A. Yes sir.

Q. I am talking about the board in Chicago.

A. I couldn't say.

Q. You didn't appeal because you knew you were wrong in hitting that old man, didn't you?

A. Well, I don't think I was wrong now. He cursed me and I hit him.

Q. If you had hit the old man before you became an employee and while you were cubbing do you know whether or not you would have had the right of notice of a hearing or any hearing at all?

A. I imagine I would have been fired just like I was.

Q. You don't know whether that appeal system applies to cubs or not?

A. No sir, I don't.

Q. Well, you say you were sore back then. Are you sore now?

A. No sir.

Q. What got you in such a good humor?

A. They did me a favor when they discharged me.

Q. So you got to liking them for discharging you?

A. Yes sir.

Q. Happy over it?

A. I am making more money out of the job I am doing now.

Q. And the same thing that got you mad, got you in a good humor, is that right?

A. You know, a fellow sometimes has to be big enough to kinder take the bitter with the sweet.

Q. Do I understand you to say that the last day that you cubbed you were with the engine sixteen hours, or on the last day that you were there sixteen hours that you worked as a regular employee the last sixteen hours on that day or eight hours?

A. You see, I cubbed eight hours that day and was put on the board at 10:30.

Q. In other words, the first eight hours that you were out there, is that time you were there cubbing?

A. That is right.

Q. And you were put on at 10:30?

A. Yes sir.

Q. On the extra board of employees?

A. That is right.

Q. And at 10:30 you became an employee and went to work more hours that day as an employee?

A. Yes sir.

Q. You were paid $5.00 for that first eight hours work for cubbing, weren't you?

A. No, they didn't turn that day's cubbing in because I worked twenty-four hours without going off.

Q. Worked twenty-four hours?

A. Yes. I cubbed from 2:30 to 10:30 and was put on the board at 10:30 and worked until 6:30, and then I worked in District No. 6 from 6:30 to 2:30 that afternoon.

Q. Anyway, this sixteen hours that you talk about, how much compensation did you draw from the Railroad Company for that sixteen hours?

A. I only drew $5.00 a day.

Q. That last day?

A. For cubbing, yes sir.

Q. I say you drew that last day $5.00 for the time you cubbed?

A. I wasn't paid for the eight hours cubbing that I worked in the twenty-four-hour period. The time slip was torn up, not turned in for that day's cubbing.

By the Court:

Q. Well, what were you paid for on that day?

A. I was paid sixteen hours on that day.

Q. At what rate, the regular contract rate?

A. The standard rate of pay, yes sir, $8.50 a day.

Mr. Whitwell: Sixteen hours.

Redirect Examination,

By Mr. Jansen:

Q. Counsel asked you something about these rules and you said they were more or less standard. Can you give some illustration of that?

A. Well, just standard operating rules on the back and it has got marked on it "Standard Rule Book", standard book of rules, I believe.

Q. What are some of the rules, just briefly?

A. You mean any portion?

Q. Yes, just an example.

A. You take, for instance, the fixed signals like indicating different movements of a train.

Q. Is that standard for all railroads?

A. And there is the question: What is a train? It is one engine or more than one engine coupled with or without cars, displaying markers.

Q. Is that standard generally as to all railroads?

A. Yes sir.

Q. Counsel also asked you about this occasion when you struck this man, you say, who was your foreman. What was the occasion of that?

A. He cursed me.

Q. What did he call you?

A. He called me a G. D. S. B.

Q. How many times did you strike him?

A. I just struck him once.

Q. I am not sure that I know what a G. D. S. B. means.

A. He called me a God damned son of a bitch.

By Mr. Whitwell:

Q. Was once sufficient?

A. Yes sir.

Further this witness saith not.

The next witness, WALTER BENJAMIN BOYD, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Walter Benjamin Boyd?

A. Yes sir.

Q. How old are you, Mr. Boyd?

A. Fifty three.

Q. Where do you live?

A. Chattanooga.

Q. How are you employed?

A. By the NC&StL Railway.

Q. In what capacity?

A. Switchman.

Q. Now, where were you employed before you were employed with the NC&StL Railway?

A. I was working for the Savannah Machine & Foundry Company in Savannah, Georgia.

Q. When did you start with the NC&StL Railway?

A. Let's see. I can't remember the date. I had it down here on a piece of paper. I began work in the shop.

Q. When was that?

A. In September, 1943.

Q. September, 1943?

A. Yes.

Q. Now, had you had any previous railroad experience?

A. Yes sir.

Q. And what was that?

A. I worked for the Marion & Eastern Railroad Company.

Q. Where is that located?

A. Marion, Illinois.

Q. What did you do there?

A. Switching.

Q. Any other?

A. No. That is, outside the Tennessee Products Company. I worked there two years.

Q. What kind of work did you do there?

A. Switching.

Q. So you had had previous railroad experience with the training with the Marion and Eastern Railroad and the Tennessee Products Company?

A. Yes sir.

Q. Now, when you went to the NC&StL Railway you first started in the repair shop?

A. In the repair shop.

Q. What do they call that?

A. They call it the Rip track, some of them, and some of them call it the repair track. Some of them call it the hammer track.

Q. Did you apply for such a position?

A. I did.

Q. And when did you start switching?

A. Well, I had the dates all down but my two kids got hold of the dates and tore them up, but the best I re-

member, I worked about three months on the hammer track and before that time had put in an application for switching.

Q. I see.

A. And then Mr. Whitten run short of switchmen and he asked me one day how about going to switching and I told him all right, it didn't make any difference to me one way or the other so he asked me to go down and learn the tracks in the yard. Of course, I had previous experience switching but I had to learn the tracks of the yard. I had to work on the hammer track in the daytime from 8:00 to 4:00 in the afternoon and then I would go either to one end of the yard or the other to learn the tracks in the afternoon when I would get off from work.

Q. How long did you work at that learning the tracks?

A. About five days.

Q. How many hours a day?

A. I got off about 4:00 and then worked until dark because they didn't have any lights and they didn't care to put me to work at night anyway. So I just worked until dark and then go home.

Q. Can you give me any idea about how many hours that would have been each of the five days? Was that in the winter or summer?

A. It was in the winter; about three or four hours.

Q. Three or four hours for five days and at the end of that time did you go to switching?

A. Well, I don't just remember what day it was that I went to switching. I had the dates down but the kids tore them up.

Q. Well, you worked on the Rip track or the Hammer track, and while you were learning the tracks did you do anything at all about switching?

A. Yes sir, I helped the boys switch down there.

Q. Did you go on with some regular crew?

A. Some regular crew, yes sir, on the south end and on the north end.

Q. Any other place?

A. Well, no. They said it wasn't necessary for me to work on the other tracks because I already had experience in switching. They said just learn the tracks; that is all I needed.

Q. How long after that, approximately, was it that you went to switching?

A. Well, I believe it was on the fifth day. I am not for sure. They put me on the board at 4:00 o'clock and I was called at 4:10.

Q. On what date?

A. On the 5th, I believe; I am not sure.

Q. Of what month?

A. Let's see. I believe that was in December.

Q. 19—what?

A. 1943.

Q. Now, did you ever get paid for any of that time you spent after hours when you were working on the Rip track and then went on the crew and worked at switching?

A. No.

Q. Would you call that cubbing?

A. Well, I don't know whether you call that cubbing or not but I imagine it would be cubbing the tracks and learning the locations of the yard.

Q. Did you do any work with the crew when you were doing that?

A. Yes sir, I helped them out.

Q. In coupling, uncoupling and so on?

A. I followed the engine and cut cars. You see, the field man works in the field, and the conductor lined the switches and gave me a signal how many cars to cut off.

Q. Now, from that time on the 4th or 5th of December, have you worked continuously for the NC&StL Railway as switchman?

A. No.

Q. How long did you work as switchman?

A. I worked there six or seven months and I quit.

Q. Six or seven months and quit?

A. Yes sir.

Q. And during those six or seven months were you on the extra board or regular?

A. On the extra board.

Q. And on the extra board did you cover all these different shifts that have been talked about in Mr. Whitten's deposition?

A. When they put me on the board they called me that afternoon at 4:11 and I worked until 10:30 and got eight hours for that. I went right on with the regular work.

Q. And then for six or seven months?

A. Yes sir.

Q. And then on the different jobs that have already been described through Mr. Whitten's deposition, did you work on each one of those jobs at one time or another?

A. I have worked on all of them.

Q. And then you quit?

A. Yes.

Q. Did you go back to work for the Railroad again?

A. Yes sir.

Q. When was that?

A. Well, I went back and made out an application to Mr. Whitten and he told me he would give me my job back and I went in, I believe it was 1/11/45 and I cubbed nine days again.

Q. You mean you cubbed nine days again?

A. Yes sir, 1/11/45,—from 1/11/45 to 1/19/45.

Q. And when you cubbed did you do the work of a switchman?

A. I helped out just like I did before.

Q. Did you cover the different shifts?

A. On two occasions I did. Mr. Whitten said he had two—no, he had four men; that he had put two on the board of ahead of me that had been cubbing previous to the time when I came back. Of course, I didn't have no objection to that. I knew I was a new man coming back. I lost my seniority, so I—he said he would put me on cubbing so as to keep in touch with me and give me something to do until he got these men—he got an opening for me back on the board.

Q. And you cubbed for nine days?

A. Yes sir.

Q. Was there any difference in the yards between the time you had worked for them for this six or seven months and the time you cubbed this nine days?

A. Six months.

Q. Was there any difference in the layout of the yards?

A. No sir.

Q. Was there any difference in the kind of work that you did?

A. Oh, you mean now?

Q. Yes sir.

A. The same thing.

Q. Is there any difference in the kind of work you did when you were cubbing and the work you did when you were down there previously for six months?

A. No sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Boyd, if I understood you correctly, you worked out in the shops on what you call the Rip track?

A. The Hammer track. I call it the Rip track.

Q. That was the repair shops, wasn't it?

A. Yes sir.

Q. Did you say you started to work there in September, 1943?

A. Yes sir.

Q. And how long was it—how long had you been working there as an employee in the shop until you began picking up this cubbing for the switchman's job in the yards at odd times?

A. Well, the best of my memory—I lost my records that I kept—it was between two and three months.

Q. Now, do you recall what month it was that you began cubbing there after you would get off from work out at the shops and cubbed in the yards for this switchman's job?

A. Well, I went to work there in September, the month of September.

Q. That was at the shops, wasn't it?

A. That was at the shops, yes sir.

Q. How long after that was it that you began cubbing after you would get off from work at the shops?

A. Well, it was around two months or two and a half months, something like that.

Q. So you began your cubbing to qualify yourself for a job as switchman somewhere around the latter part of November or December?

A. I believe it was, yes sir. I am not positive.

Q. Well, as a matter of fact, you started your cubbing there for the switchman's job now the first of December, 1943, is that right?

A. Yes sir.

Q. And that would be after you would get off from work out at the shops?

A. That is right.

Q. You would get off from work out at the shops at 4:00 o'clock?

A. Yes sir.

Q. And then you would come over to the yards and cub there from 4:00 o'clock until dark?

A. Yes sir.

Q. And so in December, 1943, dark would come about between 6:00 and 6:00 o'clock, wouldn't it?

A. I guess it would.

Q. You wouldn't get much time each day after you got off from work, you didn't have much time to learn the yards?

A. No.

Q. But you did go over there and learn the yards because you wanted a job sometime as switchman, didn't you?

A. I had done made application already.

Q. You had made your application?

A. Yes sir.

Q. You had to pick up this cubbing at odd times?

A. Of the yards, yes sir.

Q. Mr. Whitten was very nice to you about it?

A. Yes sir.

Q. And permitted you to come over there at your own pleasure and do this cubbing, didn't he?

A. Yes.

Q. And you were coming over there and learning that for your own benefit so that you could get a job later?

A. Yes sir.

Q. You were trying to qualify for that job that you had applied for?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes.

Q. So you cubbed a few hours along on different days after getting off your regular job and it was in that way that you learned the duties of the position which you later acquired?

A. Yes sir.

Q. Now, do you recall when it was that you first began working for the Railroad Company as a switchman employee? When you finished your cubbing, that is what I am getting at, Mr. Boyd.

A. Well, I had worked out at the shop—I was working at the shop at the time that they called me. I believe it was Mr. Born—I am not sure. He called me in the office in the afternoon and told me, gave me the keys, rule-book and timetable and told me that I had better go home and get some rest; that they might call me and I was in the bathhouse getting ready to go home and Mr. Finney, one of the foremen, came after me at 4:10 and I was put on the board at 4:10 and went to work that afternoon and I worked until 10:30.

Q. Now, Mr. Boyd, while you were working out there at the shop just tell us what was your rate of pay out there.

A. Let's see, I just don't remember. I believe it was 78 cents an hour and a penny an hour for punching the clock, made it 79 cents an hour. I believe that is right.

Q. And that was for eight hours?

A. Yes sir.

Q. And if you worked overtime over eight hours you got overtime?

A. Time and a half.

Q. Now, during this time that you spent over there cubbing for the position of switchman did you keep any account of the hours you spent switching? Did you turn in anything for any time while switching?

A. No sir. They wasn't paying any cubbing wages at that time.

Q. In other words, you did your cubbing for the position of switchman before they began this policy of paying cubs $5.00 a day?

A. Yes sir.

Q. You understood that too while you were cubbing?

A. Yes sir.

Q. That you were to receive nothing during the period of your cubbing?

A. Yes sir.

Q. You understood that fully?

A. Yes sir.

Q. When you would go over there I take it you would cub with the regular switch crew there somewhere in the yard?

A. Yes sir.

Q. And some member of that crew would teach you the location of the switches and location of the tracks?

A. Yes sir.

Q. And the routine work that a switchman has to know?

A. That is right.

Q. After he is an employee?

A. Yes sir.

Q. That is the truth, isn't it? And they took time to teach you those things?

A. Yes sir.

Q. And you were over there for your own benefit, weren't you, to learn?

A. Yes sir.

Q. You wanted the job, didn't you?

A. Yes sir.

Q. And you got one, didn't you?

A. I think I did, yes sir.

Q. Now, at the time you were over there cubbing, Mr. Boyd, throwing switches and things like that, did you do anything that the regular switchmen weren't there to do and paid to do?

A. Oh, yes.

Q. I mean by that, did you do anything that the regular switchmen wouldn't have done if you hadn't been there?

A. Oh, no sir, no, no.

Q. If you hadn't been there the work would have gone on just the same. And they let you throw switches and perform different things, different duties in order that you might learn how to do them yourself?

A. If you don't get the actual experience you won't know it.

Q. And that is why they let you do those things?
A. Yes sir.
Q. And that is why you did them and wanted to do them, isn't it?
A. Yes.
Q. And if you hadn't been there he would have done them?
A. Yes sir.
Q. And every thing that you were doing there to learn was something that he was being paid to do?
A. Yes sir.
Q. That is true, isn't it?
A. Yes sir.
Q. And you learned that lots better after you became an employee than you realized while you were cubbing, didn't you?
A. Well, I was already experienced in switching; I didn't have to cub on that. The tracks was the only thing I had to learn.
Q. Now, Mr. Boyd, I think I understand you and I thought your statement was very fair, if I did understand you. After you had worked a while there as an employee, switchman, in the yard, I believe you stated you quit work.
A. Yes sir.
Q. And then you went and got a job somewhere else, didn't you?
A. Hercules Powder Company.
Q. They pay pretty good?
A. They don't pay as much as they do there, no sir.
Q. But you decided you wanted to quit and you went and hired to the Powder Company and worked for them?
A. As switchman, yes sir.
Q. Then sometime later, Mr. Boyd, you came back to Mr. Whitten and told him that you were sorry that you quit and that you had made a mistake?
A. Yes sir, I did.
Q. And that you wanted to go back to work?
A. That is right.
Q. Well, when you quit you knew, of course, that by reason of quitting you had lost your seniority?
A. Yes sir.

Q. And that when you came back and wanted to go back to work Mr. Whitten said to you: "Mr. Boyd, I haven't got room for you now on the extra board If I put you on I will just have to take you off and it wouldn't do you any good", didn't he?

A. That is right.

Q. And when you came back and had this conversation with Mr. Whitten the Company had by that time adopted the policy of paying persons $5.00 a day while cubbing?

A. Yes sir.

Q. And didn't you say to him: "Well, if you have got no place for me on the extra board it won't hurt me there, and suppose you let me cub a few days?

A. Mr. Whitten suggested that himself.

Q. Did he?

A. Yes, sir.

Q. He said to you: "Now, I can't work you as an employee"?

A. That is right.

Q. "But if you are interested in it, I will let you cub a few days"?

A. That is right.

Q. "It pays $5.00 a day for cubbing"?

A. Yes sir.

Q. And you thoroughly understood about that, didn't you?

A. I did, yes sir.

Q. He was doing that for your benefit, wasn't he?

A. Yes sir.

Q. And you don't complain about that now, do you?

A. I haven't got any right to.

Q. That is right. So that is all there was to this nine days cubbing that Mr. Jansen asked you about, isn't it?

A. Yes sir.

Q. And it was for your accommodation?

A. I guess so, yes sir.

Q. And you were paid for every one of those nine days?

A. Yes sir, nine days

By the Court:

Q. How many hours did you work as a cub?
A. Eight hours.

Redirect Examination,

By Mr. Jansen:

Q. You say you worked eight hours for this nine days as a cub?
A. Eight hours a day, yes sir.
Q. Tell me again, what was the reason why you were not put on the extra board immediately.
A. Well, Mr. Whitten explained it to me, that he had four men that cubbed ten days ahead of me.
Q. I see.
A. And he was holding me off to put those four men on the board ahead of me. There was four men ahead of me.
Q. So the real reason you had to cub was that he wanted to put four men ahead of you?
A. Yes sir.
Q. So you would have to cub until those four men could be cubbed and then you would be put on the extra board?
A. Yes sir.
Q. Did you go to work immediately when you were put on the extra board?
A. Yes sir.
Q. If you had been put on the extra board when you first went to Mr. Whitten you could have gone to work immediately, couldn't you?
A. Sure.

Further this witness saith not.

The next witness, S. B. CHAMBERS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Samuel B. Chambers?
A. Yes sir.

Q. How old are you?

A. Forty.

Q. Where do you live?

A. 119 East Nineteenth Street, Chattanooga.

Q. How are you employed now?

A. Stone-Webster Engineering Corporation.

Q. Were you ever employed by the NC&StL Railway?

A. Yes sir.

Q. When was that?

A. The 26th day of November, 1943.

Q. The 26th day of November, 1943?

A. Yes, sir.

Q. Now, Mr. Chambers, where did you work before you worked for the NC&StL Railway?

A. Stone-Webster Engineering Corporation.

Q. What kind of work did you do for the NC&StL Railway?

A. Switchman.

Q. Before you went on the extra board as switchman were you required to do any sort of cubbing?

A. Yes sir, nine days.

Q. Now, will you tell us in a general way what you did when you were cubbing?

A. When I started cubbing I worked the footboard, throwing switches, giving signals, pulling pins and uncoupling cars.

Q. Did you do that the first day you were cubbing?

A. No sir.

Q. How long after you first started?

A. The second day.

Q. What was the other man on the footboard doing when you were coupling and uncoupling and signalling?

A. He was doing the same thing. He was on the south end on the second day that I pulled pins and came out with a long cut of cars and early in the morning they couldn't clearly see and he would send me back to pull pins.

Q. Was anyone with you when you were pulling pins back there?

A. Yes sir, the other footboard man.

Q. Now then, what did you do the next day?

A. The next day I was on the south end and did the same thing. I stayed there three days.

Q. And did you do certain work in connection with the switching while the footboard man was doing the same thing?

A. Yes sir.

Q. Was he with you all the time?

A. All the time.

Q. Now, how about later on in your cubbing?

A. Well, the same way; they was always there when we were on the footboard with them.

Q. Did he hold the iron that you used to pull pins with at the same time?

A. Oh, no, no. You had to pull the pins yourself.

Q. You had to do the work yourself?

A. Yes sir.

Q. Did you see any difference between that work you were doing when you were cubbing and the work you did after you were on the extra board?

A. The same thing.

Q. How many hours a day did you work?

A. Eight.

Q. Who told you when to start?

A. Mr. Whitten.

Q. Who told you where to start?

A. Mr. Whitten.

Q. Did you work full eight hours there every one of those nine days?

A. With the exception of one.

Q. What day was that?

A. That was one morning it was foggy and they wouldn't let me go and work a full day.

Q. Was that early in your cubbing or later in your cubbing?

A. It was the fourth day.

Q. How many hours did you work that day?

A. About seven.

Q. Did you ever get paid for any of this cubbing?

A. No sir.

By the Court:

Q. Well, was it prior to December, 1943?

A. It was in November, 1943.

By Mr. Jansen:

Q. Now, did you cub the different shifts during the time while you were doing this cubbing?

A. Yes sir.

Q. Did you cub more than one shift in the day?

A. Yes sir, one time.

Q. What day was that?

A. It was on the sixth day. I worked the first trick and doubled back to the second.

Q. That day how many hours did you work?

A. Sixteen.

Q. So, as a matter of fact, you worked ten different shifts, is that right?

A. Nine.

Q. In nine days you worked ten shifts?

A. That is right.

Q. Now, was anything said to you when you were put on the extra board, did anybody talk to you about going on the extra board or anything like that?

A. Yes sir.

Q. What was that?

A. The yardmaster. I went to him on the ninth day and asked him when they was going to put me on the board and he says: "I asked Mr. Whitten and he said: 'Go on the board tomorrow'." Mr. Britton.

Q. Did you take any kind of examination between the time you cubbed and the time you went on the extra board?

A. No.

Q. Did you ever take an examination?

A. Yes sir.

Q. When was that?

A. About six months prior, after I went on the board.

Q. You mean six months after you went on the extra board you took an examination?

A. Yes sir.

Q. Did anybody sign anything for you when you went on the extra board or anything like that?

A. Not that I know of.

Q. I mean you didn't have any paper for somebody to sign?

A. No sir.

Q. Each time you finished a different shift did the foreman sign anything for you?

A. Yes sir, he signed a card that I had.

Q. A card?

A. Yes sir.

Q. What did that say?

A. It didn't say a thing in the world. They told me to take it and have each foreman that I worked with to sign the card.

Q. Did you do that?

A. Yes sir.

Q. And he signed it when?

A. At the end of the shift.

Q. After you had put in eight hours?

A. After I had put in eight hours.

Q. And on that day when you put in sixteen hours did two different foremen sign it?

A. Yes.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Chambers, just a few questions. This card that you signed, that was a card showing the crew with whom you cubbed that day, wasn't it, and the foreman just endorsed his name upon that card and "O. K." that you had cubbed with his crew that day?

A. That is right.

Q. Now, I think it is clear but if I understood you correctly, you went on the board or extra board, whatever they call it, as an employee November 26, 1943?

A. That is right.

Q. That is when you went to work as an employee, wasn't it?

A. That is right.

Q. And, of course, your nine days cubbing was before that?

A. Yes sir.

Q. And after you had cubbed nine days you had some talk with Mr. Whitten about when you might expect to be put on as an employee and he said: "Well, start tomorrow", is that right?

A. Yes.

Q. Now, I take it, Mr. Chambers, that you made your application there for a position as switchman because you wanted a job later on as switchman after you had cubbed and trained and learned the yards and things like that?

A. That is right.

Q. And when you made your application, I take it, it was explained to you and you understood that you would have to cub there and learn the yards and learn how to throw switches, the location of signals and things like that in order to qualify for the job you had applied for?

A. That is right.

Q. That is the truth?

A. That is right.

Q. Now, during those different days when you were cubbing there you understood that you were not being paid anything until after you had gone on the board and on the seniority roster as an employee, didn't you?

A. Yes sir.

Q. You knew that before you cubbed a single day, that you were not being paid anything for the time that you spent in cubbing, learning the job that you later expected to get?

A. That is right.

Q. That is the truth. Now, while you were cubbing, Mr. Chambers, you cubbed with a regular crew there in the yard, different crews, of course?

A. Yes sir.

Q. And that would consist of an engineer, fireman, a switch foreman and two regular brakemen?

A. Switchmen.

Q. And you started off, I believe you said, as front footboard man?

A. Yes sir.

Q. There was a regular employee there whose job was the front footboard man's job?

A. Yes sir.

Q. And he assisted you in giving you instructions about the yard and the layout, how to throw switches and various signals and other duties that you went out there to learn so as to become an employee later on?

A. That is right.

Q. And the first day I believe you said he didn't let you do much, if anything. The first day you listened to him and watched him do those things, didn't you?

A. That is right.

Q. And after you had watched him throw the switches and had listened to his lesson, so to speak, to you about the yards and different things that you would have to learn, why, later on he let you begin to throw switches and do the different things that he was there to do and paid to do, that is right?

A. Yes sir.

Q. And you understood that he was letting you do those things for your benefit in order that you might better and quicker learn the duties of the job that you had applied for. That is the truth, isn't it?

A. That is right.

Q. And you didn't do anything while you were cubbing out there with the regular man that the regular man wasn't there to do and paid to do, did you?

A. No sir.

Q. And you had no duty and no responsibility about the operation of that crew or what it did, or any other railroad operation while you were cubbing, did you?

A. Not a bit.

Q. That duty and that responsibility was with the regular employees, wasn't it?

A. Yes sir.

Q. Now, it was necessary to cub at different places around the yards and learn different switches and different locations in the yards, wasn't it?

A. I covered the whole job.

Q. And it was necessary for you to do that to learn the different locations and switches that you would be

called upon to have contact with after you became an employee, that is the truth?

A. That is right.

Q. And you say usually you would cub regular eight hours?

A. All except one day.

Q. One day it was foggy and you just cubbed seven hours that day, I believe you said, as I understood that, and that was for your benefit, wasn't it?

A. Every bit of it.

Q. You could, while cubbing you could cub four hours and quit if you had wanted to, couldn't you?

A. Well, I wasn't supposed to.

Q. You just didn't want to; you wanted to cub just as much as you could and learn as fast as you could?

A. That is right.

Redirect Examination,

By Mr. Jansen:

Q. Mr. Chambers, did anybody ever tell you you could come late?

A. No sir.

Q. Did anybody ever tell you you could go home early?

A. No.

By the Court:

Q. Well, did anybody tell you when to go or come or did you go and come when you pleased?

A. I went to work when the crew did that I was with and quit when they quit.

Q. Well, you just went right straight through with them?

A. That is right.

By Mr. Whitwell:

Q. The hours you reported was voluntary on your part, wasn't it?

A. Yes sir.

By Mr. Jansen:

Q. You were told what crew to report with?

A. Yes.

Q. And what time to report?

A. That is right.

Q. And were you notified you could leave earlier?

A. No.

Q. Did anybody ever tell you you could come in at 12:00 o'clock on the 6:30 crew?

A. No.

By Mr. Whitwell:

Q. Mr. Chambers, just a question or two along that line. While you were told what crew or crews it was desired that you cub with so that you could better learn the different places in the yards, you were never told if you didn't cub with a certain crew or cub on a certain day you couldn't cub any more, were you?

A. No.

Q. And you did understand that if you were out there cubbing with a certain crew today and if for some reason you didn't wish to show up or couldn't show up tomorrow, that day after tomorrow you could come back and take up your cubbing, didn't you?

A. No.

Q. How is that?

A. No sir.

Q. You didn't understand that you had to cub every day, one right after another, did you?

A. Yes sir, to learn the yards so you could go on the board.

Q. In other words, you were told and you understood that you had to cub until you learned the yards?

A. Yes sir.

Q. But if you had cubbed one day and had gotten sick or something, you expected that you would be permitted to cub, if you came back the next day or the third day, didn't you?

A. Yes sir.

By the Court:

Q. In other words, when you were required to come one day after another, consecutively, you did or could you come one day and stay out one day and come another day?

A. They didn't make any specific statement to that effect.

Q. In other words, you reported for duty whenever you chose, on whatever day—

A. I reported for duty every day the first nine days.

Q. You actually came every day?

A. Yes sir.

Q. And you were required to come every day?

A. Well, I presume so.

Q. In other words, you stayed on the job?

A. Yes sir.

By Mr. Whitwell:

Q. You were not told you had to come every day but you did come every day because you were anxious to learn the work just as quickly as you could, that is the truth?

A. I reported to the yardmaster every day.

Q. And every time you would report he would suggest to you that you cub with a certain crew that day?

A. That is right.

By Mr. Jansen:

Q. As a matter of fact, weren't you told when you finished your cubbing on certain days that you would have to report to a certain crew the next day?

A. Yes sir, one time. I went to the first yard and worked that.

Q. And you were working during the day and when you got through that day they told you the next day to report to the—

A. To the first yard.

Q. And you know about, Mr. Chambers, don't you, if you had missed a day you would still have to fill in and cover each one of the runs?

A. Yes sir.

Q. How about eight hours? Do you think the foreman would sign your slip if you came and worked there two hours?

A. No sir.

Q. You think he would not?

A. No, he would not.

Q. He would expect you to be there eight hours, wouldn't he?

A. Yes sir.

By Mr. Whitwell:

Q. Mr. Chambers, with reference to that, did you ever cub with a shift for four hours and be excused for the balance of four hours after that?

A. No sir. I stayed on the shift eight hours when I went on.

Q. If you had cubbed four hours and wanted to leave the shift at the end of four hours you don't know what they might have said if you had asked them?

A. That is right.

Q. Or decided to leave of your own accord?

A. That is right.

Q. You just never tried that?

A. No sir.

Q. And talking about them telling you one afternoon to report to another position in the yards, I believe you said, the next day, that was no different to the experience you had every day in your cubbing? In other words, you would go down there every morning and report and say: "I am ready to cub today" and somebody would suggest to you which part of the yard it would be desirable for you to cub that day so that you could learn that part of the yard?

A. That is right. This was different locations downtown.

Q. That is right, and it was thought by the Company that you ought to do some cubbing over there and learn that?

A. That is right.

By Mr. Jansen:

Q. And they expected you to cover each one of those locations, every one of those locations?

A. Yes sir.

Q. And assigned you to the shifts—who assigned you to the shifts?

A. Mr. Whitten, the general yardmaster.

Q. Mr. Whitten asigned you to the shifts?

A. Yes sir.

Q. Did he explain, before you started, that you would have to cover all those shifts, those different jobs?

A. Yes sir.

Q. And did he explain that they worked eight hours a day?

A. Yes sir.

Further this witness saith not.

The Court: What is the general character of the testimony of the next witnes you propose to call?

Mr. Jansen: The next witness is a fireman, may it please the Court. We are not calling any more switchmen witnesses. We have some more but we are going to excuse them. We feel that their testimony would be merely cumulative.

The Court: That is what I had in mind. Is a fireman any different, in principle, from switchmen and brakemen? Don't they all operate just alike in the respects with which we are concerned?

Mr. Jansen: No, your Honor, they do not. I might say that what we propose to do is to call witnesses to describe in detail what firemen do and what brakemen do but not to add to it any cumulative evidence except as their testimony may differ, one from the other, as to the type of work that they do.

The Court: Why don't you call one characteristic witness for each of these that you want to show and then let it go at that? Unless you think there is some reason why you think you ought to have more than that.

Mr. Jansen: I do, your Honor. I think there are certain things about certain witnesses that the Court should be informed on and I see no objection to putting one fireman witness on, for example, and have him describe in general what type of work he does.

The Court: Let's have one for each type of job.

Mr. Jansen: And then as each particular witness is called cover only those things that may differ?

The Court: That is right.

The next witness, HARRY JORDAN ADAMS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Harry Jordan Adams?
A. Yes sir.
Q. How old are you?
A. Thirty five.
Q. Where do you live?
A. Nashville.
Q. How are you now employed?
A. The NC&StL Railway.
Q. In what capacity?
A. Fireman.
Q. How long have you been working as a fireman for the NC&StL Railway?
A. Since June 7th, 1942.
Q. Do you work at Nashville?
A. Yes sir.
Q. Now, before you went on as a fireman were you required to put in some time cubbing?
A. Yes sir.
Q. What kind of work did you do before you went with the NC&StL Railway?
A. Nashville Linen Service.
Q. What kind of work was that?
A. It is a laundry.
Q. Had you had any previous experience as a fireman?
A. No sir.

Q. Now, do you recall how many days you put in cubbing as a fireman?

A. I lacked one day of being seven weeks.

Q. Cubbing?

A. Yes sir.

Q. How many days a week?

A. I don't really know, to be accurate. I didn't think there was any reason to keep record of it.

Q. Approximately?

A. Well, five days a week.

Q. Lacking one day being seven weeks? Is that right?

A. Yes sir.

Q. That would be thirty four days?

A. Yes sir.

Q. How many hours a day?

A. Well, there is no certain hours limit to it. You just finish the run, whatever you are on.

Q. Let's start at the beginning now. Do you recall filing an application with the Railroad?

A. Yes sir.

Q. And taking a physical examination?

A. Yes sir.

Q. And then going down and being assigned to certain work?

A. Yes sir.

Q. Who did you have your talks with and who did you make your application to and so on?

A. I filed my application with Mr. Johnson, the master mechanic at the shops.

Q. Who gave you your assignment?

A. Mr. Burns.

Q. What is his job?

A. He is engine dispatcher.

Q. In what form did he give you your assignment?

A. He just gave me a slip of paper with the runs that I was supposed to go on.

Mr. Jansen: Do you have the record of this employee, Counsel?

Mr. Hunt: I don't know. Mr. Armstrong here has those records. He brought all the records he could find.

Mr. Jansen: Well, we will get to that. It is all right for the time being but we will get to it.

Q. What was on this slip of paper?

A. Well, we had a certain list, just a list of runs, so many trips in local service, local freight, so many trips in fast freight, so many trips on passenger, and hostler a couple of days.

Q. Which did you do first?

A. I went with the hostler for two days.

Q. When did you start, what time of the day?

A. I think that was the first shift, 6:30 in the morning.

Q. How long did you work?

A. Until 2:30, I think it was.

Q. On each day did you start at 6:30 and work until 2:30?

A. The best of my memory, I think so.

Q. What did you have to do then when you were cubbing on this hostler job?

A. Well, their job is to take these engines when they come in off the road and take them to the shop and get engines coming out of the shop, going out on the road, and bring them back. If it is a freight engine, they take them to the Cedar Street washhouse and if it is a passenger engine, they take it to the Union Station.

Q. Is there anything you have to furnish to the engine when you take it out or bring it out?

A. Well, you take your sand and your water and your coal. Of course, there is no work involved in taking coal, very little work involved in any of it because you just drive under the chute and drop it all down in there.

Q. Did you do that, whatever work was involved while you were cubbing as hostler?

A. You get a little piece of all of it to get your hand in.

Q. Did you have to do any firing as a hostler?

A. Very little. You just—the biggest thing is to get your fire in pretty good shape for the man you are going to turn the engine over to. Of course, if you are pulling a string of engines you have got to have a little steam to get them to the Cedar Street washhouse, not much, because it is down hill most of the way.

Q. And this engine that does pull a string of engines, is that hand-fired?

A. Not always. They generally have a stoker if it is possible to arrange it that way.

Q. Did you do the same work as fireman while you were cubbing as you did elsewhere on the hostler job?

A. Oh yes.

Q. Now, can you remember what you next were required to do?

A. Well, I went out on local for the next two days.

Q. Local?

A. Local from—between Nashville and Cowan.

Q. Do they have different locals on the road?

A. Oh yes, they do, four locals, I believe.

Q. You mean four different runs?

A. Well, they have a local between Chattanooga and Cowan and one between Nashville and Cowan, one between Bruceton and Nashville and one between Hickman and Bruceton.

Mr. Jansen: If it please the Court, I wonder if it wouldn't be helpful to the Court to have just a small map of the system? Do you have any objection, Counsel?

Mr. Whitwell: No sir, I have none whatever.

Mr. Jansen: I guess that is one of your maps (offering map to the Court). This is a drawing taken from the regular time table.

The Court: Any objection to it?

Mr. Whitwell: No sir. He just wanted you to see it.

The Court: I think I know all about it. I have been up and down the road for fifteen years.

(Map marked as Plaintiff's Exhibit No. 2.)

By Mr. Jansen:

Q. Now, I am not as familiar with the system as the Court and counsel for defendant. You say they have one local running between Nashville and Bruceton?

A. Yes sir.

Q. Another local between Bruceton and Hickman?
A. Yes sir.
Q. That is on the west end of the line?
A. Yes sir.
Q. And then a local running between Nashville and Cowan?
A. Yes sir.
Q. And then a local running between Cowan and Chattanooga?
A. Yes sir.
Q. That is on the east end of the line?
A. Yes sir.
Q. And did this slip that you had that had been given you by the master mechanic, did it have reference to these different runs that you were required to make?
A. The master mechanic didn't make that.
Q. Who gave it to you, Mr. Burns, was it?
A. Yes sir.
Q. Did it have those different runs on it?
A. Yes sir.
Q. And the first one you took after you finished cubbing as hostler helper, which run was that? Do you remember?
A. That was the Cowan local.
Q. What time did you start in the morning?
A. I think it was at 6:30.
Q. And what time did you get to Cowan?
A. Well, it was pretty late, about 9:00 o'clock, something like that.
Q. 9:00 o'clock at night?
A. Yes sir.
Q. And then where did you go from Cowan?
A. We stayed there that night.
Q. Stayed there all night?
A. Laid over at Cowan and come back the next day.
Q. What time would you start the next morning?
A. Approximately the same time, 6:30.
Q. What time would you get back to Nashville?
A. Well, that is pretty slow work, that run; get back about 8:00 or 9:00 o'clock.
Q. Around fourteen or fifteen or sixteen hours a day?
A. Not always; sometimes.

Q. I mean if you started at 6:30 or 6:00 and got through around 8:30, that would be fourteen hours a day, wouldn't it?

A. Yes sir.

Q. Now, was that a hand-fired engine or stoker?

A. Stoker.

Q. What did you have to do on that while you were cubbing?

A. Well, I didn't do much of anything except try to learn the job. Of course, the regular firemen, they have the responsibility and they don't like to turn it over to a green man. They are helpful and they help you all they can but it is just like a blind man. You can't do much, you know. They are very helpful and they help you all they can but they don't like to give you too much rope, you know.

Q. Now, that was the first day. How did you do the second day? Did you do any more than that?

A. Well, it is practically the same the second day. Of course, they let you get on to it gradually, give you a little more line all the time and you gradually catch on.

Q. After you finished the Cowan local do you remember what run you went on then?

A. Yes, I went on a freight between Nashville and Chattanooga.

Q. What was that, a through freight?

A. Yes sir.

Q. Between Nashville and Chattanooga?

A. Yes sir.

Q. You started from Nashville, did you?

A. Yes sir.

Q. What time did you start in the morning?

A. I just don't remember.

Q. Approximately?

A. Well, it could have been that night; it could have been 1:00 or 2:00 o'clock in the morning; it could have been any time.

Q. How long did that through freight take to get to Chattanooga?

A. The running time is approximately six hours, six or seven or eight hours.

Q. Then did you stay at Chattanooga for a while?

A. Over night.

Q. And came back on what?

A. Come back on the same thing unless you happen to get called for a section of a passenger train but ordinarily you get the same thing back.

Q. Well, did they call you like they did the other employees?

A. Well, yes, they called me. I told them where I was going to stay.

Q. For instance, on the local run, when you got to Cowan you stayed over night at the hotel, did you?

A. Yes sir.

Q. Some place like that, and you left word at the office where you were going to stay?

A. Told the other fireman and he called me.

Q. Then he called you before the train pulled out?

A. Yes sir.

Q. Now, Mr. Adams, as you went along did you do more work, as time went on?

A. Well, I was perfectly willing and able. I did all they would allow me to do.

Q. Did you ever get on any hand-fired engines?

A. Well, not for sometime. In fact, I don't think I ever did get on any on the Chattanooga road. I finally got on one or two down the Windy between Nashville and Bruceton.

Q. Was that while you were still cubbing?

A. Yes sir.

Q. How long after you had first started cubbing was that, could you remember, approximately?

A. Before I got this hand-fired engine?

Q. Yes sir.

A. Well, that was on the night run. I think I was pretty well finished up on my cubbing then.

Q. What did you do on the hand-fired engine?

A. Well, I shoveled coal and fired it just like the regular fireman.

Q. How much of the time did you fire and how much did the regular fireman fire?

A. Well, that was the only trip I ever made with that

fireman and he was willing to let me do some work. To tell the truth, he was pretty free about it. I helped all I could because he got sick on the job. I will never forget it. He got kinder sick and I helped out all I could. In fact, I wanted to help more. I just didn't know what it was about.

Q. Did you do most of the firing on that trip?

A. No, I tried all he would let me.

Q. Well, how much was that?

A. I just wouldn't know, to be accurate about it; maybe work fifteen or twenty minutes and then maybe he would work that long.

Q. Now, during the time that you were cubbing did you ever get on a run and get paid for it?

A. Oh, no.

Q. And you say you put in thirty-four days cubbing. Did you get any pay for any of that?

A. No sir.

Q. Did you go to work when the run started and stay with them until it finished every day?

A. Yes sir.

Q. Now, were those runs all set out on this schedule that was given to you by the Railroad?

A. Yes.

Q. Did you follow each run as it was given?

A. Yes sir.

Q. Did you miss any of them?

A. Not a one.

Q. Would you say that you worked an average of over eight hours a day each day during that thirty-four day period?

A. I just couldn't possibly say. I don't know for sure.

Q. Now, on a stoker engine, what work do you have to do on those?

A. Well, there is not much in the manner of manual labor at all. It is all a trick of knowing what to do and when to do it to keep your fire right and keep the right amount of water and know where you are and just study the road all the time.

Q. How long did you say it was before you caught on to how to run a stoker engine?

A. Well, to tell the truth, I was a little bit green when I got through cubbing. It is very complicated sometimes. There are so many little complicated things that can come up.

Q. Do you know how to run one now?

A. Oh, yes sir. There are so many little things that come up that you have to know what to do. You can't just take and tell a man how to fire one. He has got to get on it and get the feel of it.

Q. He has got to actually do the firing?

A. Yes sir.

Q. And that is what you did during this cubbing period?

A. Yes sir.

Q. So as to get the feel of it?

A. Yes sir.

Q. And then you are also required to know the layout of the road?

A. Yes sir.

Q. The hills and things like that?

A. Yes sir.

Q. Why would you have to know where there was a hill?

A. Well, it is like driving an automobile. You have got to get up steam to get over it.

Q. Is there any difference in the work you did after you were firing and what you did when you were cubbing?

A. No.

Q. The same kind of work?

A. The same.

Q. The hours the same?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Adams, I believe you say you live in Nashville?

A. Yes sir.

Q. And you began work for the Railroad Company in June, 1943?

A. 1942.

Q. Now, before you went to work for the Company you filed a written application that has been referred to here?

A. Yes sir.

Q. And took a physical examination?

A. Yes sir.

Q. Now, when you filed your written application out at the master mechanic's office you were told then that you would have to cub for a period to learn the road and learn your duties, the duties of a regular fireman in reference to an engine and how to fire engines and those different things, weren't you?

A. Yes sir.

Q. Learn the signals and various things?

A. Yes sir.

Q. You were told, of course, then as I understand it, that you would not be paid during the period of your cubbing and you understood that, didn't you?

A. I understod it after I came on the road, yes sir.

Q. In other words, you understood that back in 1942 the Company was not paying persons?

A. Yes sir.

Q. For the time that they would spend in cubbing and learning the duties of the job that they applied for?

A. I knew that.

Q. You say you were a little green when you first started to work as a regular employee?

A. Well, yes sir.

Q. In other words, you don't think you cubbed too long, do you?

A. No, I don't think so.

Q. Now, Mr. Adams, when you were going through this cubbing period for your own benefit to learn the duties of a job that you had applied for and which you hoped to get later on—didn't you?

A. Yes sir.

Q. Does a person while cubbing and actually performing the manual activities of operating a stoker or hand-fired engine, does he actually waste coal while he is learning?

A. I suppose he will, to a certain extent.

Q. Now, you were handed some sort of a slip, I believe

you said, by Mr. Burns, engine dispatcher, that had on it the schedules up and down the line, some of them local trains, some fast freights, some passenger maybe, that is right, isn't it?

A. That is right.

Q. And just above that schedule do you recall there was written: "It is desired that you cub the following schedules"? Is that the language used?

A. I think so.

Q. Now, the reason you cubbed the schedule exactly as it was handed to you was because it was convenient for you to do that and you were anxious to learn the road and learn the different duties of a regular fireman just as quickly as you could? That is true, isn't it?

A. That is right.

Q. And you cubbed those different schedules right down the line only because you wanted to do that to learn just as quickly as possible. That is it, isn't it?

A. Yes sir.

Q. Now, just a very few questions along this line, and I want to ask you, since some mention was made of thirty-four days cubbing, do you know the mileage from Nashville to Chattanooga, the road mileage?

A. 151 miles.

Q. Do you know the road mileage from Nashville to Hickman, Kentucky?

A. 172.

Q. Then you had to learn on all that mileage of the road the roadbed, location of the stations, sidetracks, switch tracks and things like that all up and down the line, didn't you?

A. That is right.

Q. And on part of that mileage, especially between Nashville and Chattanooga, there is one or more what we call branch lines coming into the main line, on which you were cubbing, aren't there?

A. Yes sir.

Q. And there had to be switches at those different intersections as well as side tracks at various places along the line, wasn't there?

A. That is right.

Q. And you had to learn the different fixed signals there were along the line, block signals, centralized traffic control indications and things like that, didn't you?

A. Yes sir.

Q. And the fireman was there at all times, wasn't he, Mr. Adams, and giving you instructions about how to fire on approaching a grade, teaching you the different switching operations, in the case of a local train at the various stations along the line? Is that true?

A. He was always with me.

Q. And you had to learn the stations on the line between Chattanooga and Hickman, didn't you?

A. Yes sir.

Q. And the fireman, in addition to telling you things about the locomotive, about signals, switching and those things, he showed you from time to time and let you watch him do different things, didn't he?

A. Yes sir.

Q. For example, he would show you how to operate a stoker-fired engine and explain that to you and then later on he would let you do some of that, didn't he?

A. That is right.

Q. And so you learned not only by what he said to you but by watching him and also by actually performing the manual activities that the regular fireman would have to perform had you not been there, that is it, isn't it?

A. That is right.

Q. And I believe you say, if you have any complaint at all to make, it is that some of them wouldn't let you do enough of that because you felt like if they would let you do more you would have learned sooner, is that not true?

A. That is right.

Q. And whatever you did by way of firing the engine or any other work that you may have performed while you were cubbing, that work, whatever done, was the work that the regular fireman was there to do and paid to do, wasn't it?

A. That is right.

Q. And you had no duty nor any responsibility for the

operation of any train that you cubbed on while you were cubbing, did you?

A. No.

Q. That duty and that responsibility rested with the members of the regular crew, didn't it?

A. That is right.

Q. And you cubbed with a full crew during the time that you cubbed, didn't you?

A. Oh yes.

Q. In addition to learning the road from Nashville to Cowan, Cowan to Chattanooga, Nashville to Bruceton and Bruceton to Hickman, you say you cubbed a while as hostler at the shops?

A. Hostler helper.

Q. And that was to learn the duties of a regular fireman, wasn't it?

A. Oh yes.

Q. And so everything you did, Mr. Adams, while you were cubbing was for your benefit, wasn't it, to learn as quick and as well as you could learn it?

A. That is right.

Q. You knew you had to go through this cubbing experience before there was any possibility of you getting on the extra board or roster of employees, didn't you?

A. Oh yes.

Q. And when you applied you were given a questionnaire with four or five hundred questions in it?

The Court: Is this one going to be any different from the others?

Mr. Whitwell: No.

The Court: Let's don't have any more of that, then.

Mr. Whitwell: All right. I wanted to ask this:

Q. If I understood you correctly, you said that when you would make a run, Mr. Adams, I mean go with a regular crew on a run, say from Nashville to Chattanooga, you would stay there somewhere along with the regular crew and when they would come out the next day some member of that crew would call you and let you know when they would go out. That is what you mean by that?

A. That is right.

Q. The regular train caller doesn't call cubs like he calls the members of the regular crew, does he?

A. No. He would if the cub would call him and tell him where he was going to stay.

Q. If you tell him and ask him to call you, he would; otherwise, he wouldn't?

A. That is right.

Q. But he is required to call every member of the regular crew, isn't he?

A. Yes sir.

Q. Who is first out?

A. Yes sir.

By Mr. Jansen:

Q. One question I forgot to ask you. Did you take an examination before you went on the extra board?

A. Physical?

Q. No, no, on the rules?

A. Yes.

Q. Between the time you cubbed and the time you went on the extra board?

A. Yes.

Further this witness saith not.

The Court: After lunch let's take up a different type of witnesses. I don't want to interfere with the manner in which you present your case but I just want to point out the lack of necessity for cumulative testimony. Let's just get characteristic witnesses that illustrate the situation.

Recess until 2:00 o'clock.

Thereupon a recess was taken for lunch until 2:00 o'clock.

Afternoon Session.

The next witness, J. W. ARNOLD, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jansen:

Q. Your full name is what?
A. James Woodard Arnold.
Q. How old are you?
A. Forty-one years of age.
Q. Where do you live?
A. 1200 Stainback, Nashville, Tennessee.
Q. How are you now employed?
A. L&N Railroad.
Q. Have you ever been employed with the NC&StL Railway?
A. Yes sir.
Q. When were you employed with the NC&StL Railway?
A. June, 1943.
Q. What kind of work were you doing before you were with the NC&StL Railway?
A. Railway Express Company.
Q. How many years had you been with them?
A. Three.
Q. Had you learned a little bit about railroading while you were with the Railway Express?
A. Well, in a way, yes sir, by working downstairs unloading cars, railroad cars, express cars and baggage cars.
Q. So railroading was a little bit familiar to you anyway?
A. Yes sir.
Q. When you first went with the NC&StL Railway were you required to spend some time cubbing?
A. Yes sir.
Q. Do you remember for how long, how many days you spent cubbing?
A. About twenty-two, I believe.
Q. Did you ever get paid for any of those days?
A. No.
Q. Do you remember when you started cubbing?
A. June 2nd, I believe.

By the Court:

Q. What year?

A. 1943.

By Mr. Jansen:

Q. Now, Mr. Arnold, the defendant company has produced your record with the company, the NC&StL Railway, and I will ask you, first, to just tell us who you talked with about a job with the NC&StL Railway.

A. I talked with Mr. Shanon.

Q. Who is Mr. Shannon?

A. He is the trainmaster's clerk.

Q. And in talking to Mr. Shannon did you have to file some application form or something like that?

A. Yes sir.

Q. Did you take a physical examination?

A. Yes sir.

Q. Did you have to pay for that?

A. Yes sir.

Q. How much?

A. $2.00.

Q. Did the Company reimburse you for that?

A. No.

Q. After your physical examination did you go back to see Mr. Shanon?

A. Yes sir.

Q. Did he provide you with something to indicate how you should do your cubbing?

A. He gave me a list of my cubbing.

Q. Now, calling your attention to your record, I wish to show you something that is dated June 6, 1943. Do you recognize that?

A. Yes sir.

Q. And what is that?

A. That is the cubbing list that you go through.

Q. Was this given to you by Mr. Shannon before you started your cubbing?

A. He didn't give me this but he gave me another list and I did see this list.

Q. You saw this list and the list you see here, that I

have just called your attention to, did that have the same list of trains and times on it?

A. Yes sir.

Q. Now, did he give you anything else at that time?

A. He gave me a pass and the switch key, cubbing list and a light.

Q. And a cubbing list and a light?

A. Yes sir. Of course, I bought the light.

Q. Now, I call your attention to this other document dated June 6, 1943, which has conductors on passenger and freight trains. I will ask you what that is?

A. That is a cubbing list.

Q. Is that what was given to you at the time by Mr. Shannon?

A. Yes sir.

Q. And all of these dates and signatures that are on this, what are those?

A. This is the date and that is the train and that is the conductor of the train.

Q. And when did those dates and the trains and conductors' names go on there?

A. The days that I worked on them cubbing.

Q. Before you started or when you finished?

A. At the end of the trip.

Q. Now, I call your attention to this form, which has in its corner, upper right-hand corner "Form 284 revised 7/19/29", is that the application blank you filled out?

A. Yes sir.

Q. Did you fill out anything else at that time that you remember?

A. I filled out another form relieving the Railroad of any responsibility while I was cubbing in any way, in case of an accident, I believe.

Q. Will you look in this record and see if you can find it?

(Witness looks through file.)

Q. Is this it that you have come to in it, a release dated June 6, 1943?

A. Yes sir.

Q. You also signed that at the time you filled out your application?

A. Yes sir.

Q. You have had a chance to run through this record. Is all of this your record with the NC&StL Railway?

A. Yes sir.

The Court: Let me see that agreement that he said he signed there about that release.

(Handing paper to the Court.)

By Mr. Jansen:

Q. Now Mr. Arnold, that list of trains or assignments with which you are to cub doesn't indicate the hour that they start. Will you find out about that? How do you find that out?

A. Well, by consulting the timetable is one way, leaving out of Nashville. The caller always called me for that crew. I told him I was going to be on that crew, what day I was going to be on it and he would call me for that day.

Q. You mean the caller would call you every day you were to go out while you were cubbing?

A. Yes sir.

Q. How about on the other end?

A. When we got to destination there the conductor, I would register on the back there; he would put my name down as a cub and the caller would call me with the rest of the crew.

Q. And the conductor would put your name down, would he?

A. Yes sir.

Q. Now, the first day that you cubbed, can you remember the train that you were on?

A. It was on the Bruceton local.

Q. Well, will you tell us in a general way what you did that first day.

A. Well, the first two or three hours of it I was totally blank because I had never been on a train working and I didn't know what to do except wa ch the other fellow but after several hours of it then, why, they would turn me loose to cut off cars, throw switches and things like that.

Q. And when you say they would turn you loose, what do you mean by that?

A. Well, they would tell me to cut off three cars back or four cars back in the train and I would go on and cut them off. He would sign the engineer to slow up to make a coupling and I would make the coupling, back the train in and make the coupling.

Q. Was there anybody there with you when you were making the coupling or cutting them off?

A. He would be placed at another place in the train maybe one car or two or three car lengths from me.

Q. He wouldn't be right with you?

A. No.

Q. That was the first day?

A. The first day, after several hours on that crew.

Q. What other kind of work did you have to do on this local the first day?

A. Well now, of course, they had a lot of freight to unload at these stations with a two wheel truck and I did my part of that.

Q. What do you mean—freight to unload? Did you have less than carload lots?

A. They have what they call a local car and that has from one to a hundred pieces for certain stations along the road and it has got to be unloaded there and so much freight loaded there and on farther down the road and, of course, the local crew has to do that, the brakemen.

Q. Well, did you do any of that unloading?

A. Yes sir.

Q. How long did it take you to learn to run one of these two-wheel trucks?

A. I had a three-year post-graduate course at that at the Express Company. I didn't need any instructions to do that.

Q. Now, did you help unload at stations?

A. At every station.

Q. And how about loading?

A. Well, I helped load it.

Q. Was anything ever said to you about loading and unloading freight?

A. At one station, yes sir.

Q. What was that?

A. I threw the switch, the main line switch to let the

engine and house car back into the house track and the engine came back so fast I couldn't get on it, so I stood at the switch and the conductor, he made the remark to the head brakeman: "If that cub don't get down here and help do this work I won't sign his papers when he gets to Bruceton."

Q. What kind of work did he want you to help do?

A. Unload one piece of freight.

Q. And the conductor was in charge of the train, was he?

A. Yes sir.

By the Court:

Q. Did the regular brakemen customarily perform that kind of work, loading and unloading?

A. Two brakemen.

Q. Brakemen did that ordinarily?

A. Yes sir.

By Mr. Jansen:

Q. How many of them were doing it when you were cubbing?

A. All of them.

Q. Does it slow down the work for all three of you to load and unload freight?

A. I would think it would help out.

Q. How long did you work on this local—do you remember, the one from Nashville to Bruceton?

A. The first day was about fifteen hours.

Q. What time did you start in the morning?

A. 6:00 or 6:30.

Q. Did you work all along with the crew, all day long?

A. Yes sir.

Q. Did they tell you at the end of eight hours you could sit down at some place or anything like that?

A. No sir.

By the Court:

Q. Now, was that the length of time that you customarily worked, that many hours, as a cub a day or was that just an exceptional day?

A. Well, it averages that much on most all locals.

Q. On most all what?

A. Local trains.

Q. Well, how many days did you work on a local while you were cubbing?

A. That was what we call a four-day local. It makes a trip, off a day and makes another trip. Works four days a week, so I made two trips with the same crew between—I went to Bruceton one day, to Nashville the next and laid over a day and then made another trip.

By Mr. Jansen:

Q. Can you, by referring to this record, tell me how many days you spent on locals? Count them out for us. Of the 22 days?

(Witness counting from the record.)

A. Seventeen.

Q. Seventeen out of twenty-two days were spent on locals?

A. Yes sir.

Q. And they were not always the same local?

A. No sir.

By the Court:

Q. Well, would you work fifteen hours a day on all of those trains?

A. They were twelve-hour trains. They were guaranteed twelve hours and they always made overtime.

Q. Sometimes they would run late?

A. Yes sir.

Q. Well, the regular crew got overtime and you just—

A. Experience.

Q. You were not compensated for that time?

A. No sir.

By Mr. Jansen:

Q. You say they were guaranteed 12 hours. What do you mean?

A. It was what you call a guaranteed run, guaranteed 150 miles a day, eight hours or 150 miles to make twelve hours.

Q. Do I understand that in most cases it took over the twelve hours?

A. In most cases it took over twelve hours. A lot of times the Hours of Service Law would catch them on the road.

Q. What do you mean by that?

A. Sixteen hours. They can't work after fifteen hours and fifty-nine minutes.

Q. Were you ever caught by the Sixteen Hour Law when you were cubbing?

A. No.

Q. You were afterwards?

A. Yes sir.

Q. Now on each of these locals, these seventeen days out of twenty-two days, did you handle freight in and out of box cars?

A. Every day.

Q. And did you do the other work that a brakeman on a train does?

A. Yes sir.

Q. Did you have someone with you right by your side all the time you were working?

A. No.

Q. Explain that to us.

A. Well, I was just what you might say, another man in the crew and if there was a move to be made they would send me back to do it or send me ahead to throw switches. Of course, I didn't know where cars was spotted along the road and one of the older men would have to do that but whenever he stopped the engine I would cut them off or maybe drop them in a side track.

Q. You did that on all of these local runs?

A. Yes.

Q. You say you were sort of an extra man on the crew?

A. Yes sir.

Q. While you were doing what you were doing the other men were doing something else?

A. Yes sir.

Q. Now, besides the local, can you tell us what other kind of work you did while you were cubbing?

A. Three days in Bruceton on a switch engine.

Q. Let's talk about that for a minute. Do you remember which days they were, how long after you started?

A. I was mistaken. Here is the switch engine here (referring to a record), this 954. Three days right here. You see, I was confused. You see, that is the south end local here—"S.E." here, which is "Switch Engine", the same thing.

Q. So you spent three days in the Bruceton yards?

A. Yes sir.

Q. Now, tell us about that. You had been cubbing for a while on the locals?

A. A few days, yes sir.

Q. How did you get to Bruceton?

A. I worked baggage to Bruceton on a passenger train.

Q. You mean you had to work to get to Bruceton?

A. Yes sir.

Q. What did you do on the baggage car?

A. Well, of course, we all know that is pretty light down there. They don't have a whole lot of baggage, just a few pieces, and, of course, you have to put it off when you come to a station where it goes, and pick it up, if they have got anything there. And then have to write up all this stuff, keep record of it.

Q. Did you do all of that while you were cubbing?

A. I didn't the record part of it, no, the writing.

Q. What part did you do?

A. I helped load and unload baggage at stations.

Q. Was there another man on the baggage car?

A. The regular baggageman, yes sir.

By the Court:

Q. What did he do?

A. He would say: "Put this off at Kingston Springs; put this suitcase off at Burns" and, of course, it would be sitting right there in the door and you set it right off.

By Mr. Jansen:

Q. Was there anything about that baggage work in this schedule here that they gave you?

A. I don't see it.

Q. How did you happen to go on the baggage to Bruce-

ton before you went on the switch engine in the Bruceton yards?

A. It shows in some of these lists there somewhere. He probably might have just told me not to finish the run or to work baggage back. I don't remember exactly how that was.

Q. But you know you did work baggage?

A. Yes sir.

Q. You know you were told to do it?

A. Yes sir.

Q. Whether it is on your list or not?

A. Yes sir.

Q. Who told you to do that?

A. Mr. Shannon.

Q. Did you work baggage more than once while you were cubbing?

A. About three times, the best I can remember.

Q. Was that in between places?

A. In between stations, yes sir.

Q. You never did get a free ride then?

A. Not exactly; always in the baggage car.

Q. Always in the baggage car, and you worked in the baggage car and did this work you have described?

A. Yes sir.

By the Court:

Q. Was that baggage car work part of the duties of the regular brakeman that you were understudying?

A. Yes sir, under the baggageman. Every car has a baggagemaster. You see, when I was turned loose on the board I was subject to catch his place in case he laid off.

Q. You were cubbing for that kind of a job?

A. Yes sir.

Q. And that was work done by the regular man on that job?

A. Yes sir.

Q. You just did it in his place?

A. Yes sir.

By Mr. Jansen:

Q. That was part of the work you might be called to do from the extra board?

A. Yes sir.

Q. In other words, each one of the four different runs on the railroad, including the switch engine at Bruceton and the switch engine at Cowan, was part of the work you might be called to do when you are on the extra board?

A. That is right.

Q. Is that the reason why they had you do all those various things?

A. Yes sir.

Q. Now, tell us about cubbing in the yards at Bruceton. What did you do there?

A. Well, the switch engine makes up and breaks up trains there. They make up out-going trains and break up in-coming trains. Of course, it has a foreman and two switchmen. Of course, I just got out there with them and helped them do the work.

Q. How did you do that? Will you tell us what part you did?

A. Mr. Thornton put me on the end that cut the cars off and he would give me a signal, how many to cut off, and I would cut them off and this other man down here would line the track up for them to go into.

Q. Was anybody else working right where you were?

A. No sir.

Q. You were doing that all alone?

A. Yes sir.

Q. The very first day you were in the Bruceton yards?

A. Yes sir, the first day.

Q. Where was the other man?

A. He was there in some other part of the yard splitting up a train and getting them ready to be worked.

By the Court:

Q. Would it be other work in the yard that he would eventually have to do anyway?

A. Yes sir.

Q. While you were cutting off those cars?

A. Yes sir.

By Mr. Jansen:

Q. Now, in the switching of the Cowan yard did you do the same thing?

A. Yes sir.

Q. Each day that you were switching in the Bruceton and Cowan yards how many hours did you work?

A. Eight hours.

Q. Did anybody ever tell you that you could come later or go home early?

A. No.

Q. Did anybody ever say anything to you about what run you should take or whether you could lay off?

A. They told me to follow that list that they gave me.

Q. Who told you that?

A. Mr. Shannon.

Q. Did you ever speak to Mr. Shannon about laying off?

A. Well, I had been to Nashville on the off-day one day and was going out on the local and I asked him if in case the Hours of Service was going to get us could I get off of this local and catch this passenger train home and he said: "Stay on that crew."

Q. Was there more than one shift in the Bruceton yard?

A. They work twenty-four hours a day.

Q. Did you work the different shifts there?

A. No, I worked the same shift.

Q. Each day you worked?

A. Yes sir.

Q. While you were cubbing?

A. Yes sir.

Q. Did you ever receive any pay for that cubbing on the NC&StL Railway?

A. No sir.

Q. Now, besides the local trains and the switching at Bruceton and at Cowan did you do any other type of work while you were cubbing, like pusher, for example?

A. They have a pusher at Cowan.

Q. Did you do that while you were cubbing?

A. Well, that was one day—I cubbed one day at Cowan on the pusher. At Cowan, of course, it worked in the yard and worked as a pusher too.

Q. Oh, it did both, you mean, switching and pushing?

A. Yes sir.

Q. What is that pusher there?

A. That is to assist trains over Cumberland Mountain.

Q. How many men are on the crew of the pusher?

A. One.

Q. Just one of the ground crew?

A. Yes sir.

Q. And when you were cubbing on that how many were there?

A. Two.

Q. What did you have to do on the pusher?

A. Well, when we carried a freight train over we always pushed it over from the rear end. Of course, this brakeman on there, he came down to the station and coupled into the train and shoved it over the hill, and he rode the front end of the engine here and the cub pulls the pin and the train would go on and he would come back down the mountain with his engine.

Q. Did you ever do any of that?

A. Yes sir.

Q. Did you ever do any riding the front of the engine and pulling the pin?

A. Yes sir.

Q. You did that yourself?

A. Yes sir.

Q. While you were cubbing?

A. Yes sir.

Q. Now, is there any difference between the work you did on the local train between Bruceton and Nashville and that between Nashville and Cowan?

A. The same thing.

Q. You did the same kind of work?

A. The same kind of work.

Q. What is the difference in cubbing on one from the other?

A. It is the same.

Q. So when you were working on four of these different runs in your cubbing you were doing the same kind of work on each one of the runs?

A. Yes sir.

Q. Tell me, how long did it take you to catch on to coupling and uncoupling trains, throwing switches and so on?

A. Oh, possibly fifteen or twenty minutes.

Q. Does that include all the actual manual labor that a switchman does?

A. Yes sir.

Q. And it took you about fifteen or twenty minutes?

A. Yes sir.

Q. And the rest of your time spent in cubbing was learning the road?

A. Yes sir.

Q. Location of tracks, switches and those things?

A. Yes sir.

By the Court:

Q. If I understood you now, when you were cubbing in the yard you worked eight hours a day and no more than that?

A. Eight hours. I don't believe that crew made any overtime the three days I was with them.

Q. Now, when you got to cubbing out on the road you were sometimes put on a local train that had a twelve-hour schedule?

A. Yes sir.

Q. And if the train was on time you would work not more than twelve hours on that?

A. Yes.

Q. And sometimes the train was as much as three hours late and you would have to work as much sometimes as fifteen hours?

A. Fifteen—not on every occasion. On a real light day they might get through the run in eight hours but they still get paid for twelve hours regardless of the time it takes to run it.

Q. What would be the rule? Would the local train leave pretty well on time, as a rule, or would it be late every day?

A. Late every day.

Q. How much late?

A. Anywhere from one to three or four hours.

Q. And you said you never did run into the Sixteen Hour Law?

A. Up to fifteen hours several times.

By Mr. Jansen:

Q. Mr. Arnold, will you file this as an exhibit and part of your testimony? (Man's personal record with the Company.)

Mr. Whitwell: Now, if the Court please, the only objection on earth I have to that is that that is our original record. We have no other record. I have no objection in the world to the gentleman making and filing a copy of that record but it is a necessary record that we keep.

The Court: Well, it could go in as evidence subject to your right to withdraw it from the file when final judgment is rendered herein or the plaintiff, who offers it shall make copies and substitute. If you want to put it in under those circumstances you may do so.

Mr. Jansen: Let me suggest the alternative that the defendant make copy. They are more familiar with it and they have the forms.

The Court: Well, if they want to accept that alternative, I won't put it on them.

Mr. Whitwell: Of course, they subpoenaed over three hundred records and if you make similar request of us as to those three hundred records—

Mr. Jansen: Oh no.

Mr. Whitwell: I won't really assume the expense or the responsibility of going to the expense.

The Court: Let it go in evidence with the condition that the Defendant may withdraw it from the file after fifteen days subsequent to final determination here, final judgment here, and if the plaintiff wants copies to remain in the record you can substitute them before that time. Go ahead.

(Papers so filed as Plaintiff's Exhibit No. 3.)

Cross-Examination,

By Mr. Whitwell:

Q. I believe it is—his Honor asked you about that. I understood you did your cubbing sometime about June, 1943?

A. Yes sir.

Q. And you cubbed twenty-two days?

A. Something like that, yes sir.

Q. And that cubbing was on the line of road in East Tennessee and to Hickman, in West Tennessee?

A. Yes sir.

Q. And you cubbed on locals the bigger part of the time?

A. Yes sir.

Q. Now, isn't it a fact, Mr. Arnold, that it was desired that you cub on a local train the major part of the time because by cubbing on a local train you can learn quicker and faster the location of side tracks, switches, yard tracks, house tracks, etc., because the local train actually serves those local stations where these through trains do not? That is true, isn't it?

A. Yes sir.

Q. So you gained your experience and training quicker by having cubbed on these local trains than by cubbing on fast through freight trains, didn't you?

A. Yes sir.

Q. And these schedules that were handed to you, they were so spaced about as to give you experience on the line of road from Bruceton to Hickman, on the line of road from Bruceton to Nashville, on the line of road from Nashville to Cowan and on the line of road from Cowan to Chattanooga, weren't they?

A. Yes sir.

Q. Now, you spoke of spending some time learning the yards at Bruceton. I will ask you whether or not it is true that the regular road crews perform such switching as is done in the yards at Bruceton?

A. No sir.

Q. They do some of the work in the assembling of trains down there, don't they?

A. No sir.

Q. They do have to be familiar with the yards there for the purpose of their operations there, don't they?

A. Yes sir.

Q. And you understood that when you were cubbing it was for the purpose of learning those yards in connection with your road work if you later got a job?

A. No, not quite, Mr. Whit., at Bruceton, not road work.

Q. Now, all that switching was part of it, in connection with the road operations, wasn't it?

A. No sir, that is not connected with the yard work but I was studying to take that job off of this board at Nashville, the reason I done that.

Q. Oh yes. By performing that switching you were subject to obtain a job there in case of a vacancy?

A. On the switch engine, yes sir.

Q. Well, that was true of the regular employees too, wasn't it? That was available to them just the same?

A. Yes sir.

Q. And that is why you did that switching there. You spoke of this pusher engine business up at Cowan. I believe you said the pusher engine was used to help or assist long heavy trains, both freight and passenger, over the mountain?

A. Yes sir.

Q. Now, that work in the operation of the pusher is performed by the regular employees, isn't it?

A. Yes sir.

Q. And such activities as you were engaged in in connection with the pusher operation, it was for your benefit, for you to learn the duties of a brakeman in connection with the pusher operations and activities; wasn't it?

A. Yes sir.

Q. And you didn't do anything in connection with that pusher operation that the members of the regular crew wouldn't have done had you not been there?

A. No sir.

Q. In other words, everything you did by way of learning the duties of a brakeman in reference to that was something that the regular brakeman was there to do and paid to do, wasn't he?

A. Yes sir.

Q. Now, if I understand you correctly, in connection with your cubbing, you did some cubbing in the baggage car to learn the duties of the baggagemaster?

A. Yes sir.

Q. The regular man. Now, in learning that you were shown by him how to do certain things in connection with it, and you also learned by actual performance of those things yourself there with the baggageman, didn't you?

A. Yes sir.

Q. And whatever you did in connection with learning that was something that the regular man was there to do and paid to do, that is true, isn't it?

A. Yes sir.

Q. And you did that for the purpose of learning the duties of that job?

A. Yes sir.

Q. So that if the baggageman were off you would be eligible to catch his job, wouldn't you?

A. Yes sir.

Q. Now, Mr. Arnold, while you were cubbing you had nothing to do, no control over the operation of the train. That was with the train crew, wasn't it?

A. Yes sir.

Q. You had no duty and no responsibility for the operation or in connection with the operation of that train; it was with the regular crew, wasn't it?

A. Yes sir, I didn't have any responsibility but I had a duty.

Q. Well, in other words, you were there trying to learn, weren't you?

A. Yes sir.

Q. Now, in connection with this training, had you had any prior experience as a switchman before you began cubbing with the Railroad?

A. No sir.

Q. Now, the conductor or the regular brakeman there, they would show you and tell you about the locations and about the switches and about the signals and those various things a regular brakeman has to do and perform, wouldn't they?

A. Yes.

Q. And then you would also learn, not only by what they would tell you, but by watching the regular man perform those various duties?

A. And performing them. I learned a lot that way.

Q. I am getting to that. Then you would learn also by the actual performance of those various things?

A. Yes sir.

Q. You were doing that for your own benefit and learning, weren't you, to qualify yourself for this job that you had applied for?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes.

Q. And whatever you did was something that the regular man was paid to do and he was at hand and let you do it, that is it, isn't it?

A. Yes sir.

Q. Now, when you made your application for the position of a brakeman, you understood then and were told that you would have to go through a cubbing period to learn the duties of a brakeman before you could be employed, weren't you?

A. Yes sir.

Q. You understood and were told then that you wouldn't be paid any compensation or money for the time that you spent learning the duties of the job which you expected later to get?

A. Yes sir.

Q. There was no misunderstanding at all about that?

A. None at all.

Q. And the reason you cubbed was to learn so that you could get a job later?

A. That is right.

Q. And before you went on the regular board of employees, the roster of employees, you took a written examination, didn't you?

A. Yes sir.

Q. You passed the examination?

A. Yes sir.

Q. And all of that was before you got on the board and became an employee?

A. That is right.

Q. After you went through all this routine you then went to work, went on the roster of employees and began drawing the regular contractual rate that was applicable to that job?

A. Yes sir.

Redirect Examination,

By Mr. Jansen:

Q. One question, Mr. Arnold. Mr. Whitwell spoke to you about the benefit—you were the only one who got any benefit from the work you did while you were cubbing?

A. Well, I would think the Railroad benefited by it.

Q. In what respect?

A. Well, that was just helping out over the road, just doing my part of the work just the same as any other man in the crew.

Further this witnes saith not.

The next witness, R. T. JUSTICE, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. Roy Templeton Justice.

Q. Where do you live?

A. Nashville.

Q. How old are you?

A. Forty-six next month.

Q. Who are you working for now?

A. The L&N Railroad.

Q. Were you ever employed by the NC&StL Railway?

A. No sir, not no more than cubbing.

Q. You did some cubbing?

A. Yes sir.

Q. Do you remember when that was?

A. That was about the 18th day of June until about the 8th day of July.

By the Court:

Q. What year?

A. 1944.

By Mr. Jansen:

Q. 1944?

A. Yes sir.

Q. Do you remember how many days it was?

A. Yes sir.

Q. How many days?

A. Sixteen days cubbing and one day that Mr. Shannon said he would pay me for taking the examination, made seventeen days.

Q. Did you hear the testimony of Mr. Arnold?

A. Yes sir.

Q. Did you cub the local runs such as he cubbed?

A. No sir.

Q. What did you do different from him?

A. Well, I cubbed one day on local from here to Cowan. I made three round trips to Bruceton, three round trips to Chattanooga and one round trip on baggage.

Q. On the round trips to Chattanooga, was that on through freight?

A. That was slow freight.

Q. That is the same as through freight, is it not?

A. Yes.

Q. Did you hear the testimony of Mr. Arnold with regard to work that was done while he was cubbing?

A. Yes sir.

Q. Did you do a similar kind of work?

A. Yes sir.

Q. Did you get paid for every day that you spent cubbing?

A. No sir, I got a check for $30.00 after I cubbed eight days.

Q. $30.00?

A. Yes.

Q. And you cubbed altogether seventeen days?

A. Sixteen days cubbing and one day for examination which Mr. Shannon filled out a card for and said he would pay me, for taking the examination.

Q. And did you pass the examination?

A. Yes sir.

Q. And after you passed the examination that put you automatically on the extra board, doesn't it?

A. Yes sir, but I didn't go on the extra board.

Q. You didn't go on the extra board?

A. No.

Q. Why was that?

A. Well, Mr. Shannon, when I got this check—well, when I made this first trip to Bruceton and come back, the next trip we dead-headed but I didn't know anything about it until I was in the yard and the conductor came in the caboose and said: "We will dead-head to Bruceton," which we did. Then we made a Martin turn-around while we were down there. Then when we come back I went up to Mr. Shannon and told him and he said: "We will not pay for a dead-head trip and the Martin turn-around." I says: "Well, I will quit right here." He says: "You go on and do your cubbing and finish up, take your examination, and I will pay you," which I did do, and then after I got through my examination I went down and I wasn't even on the payroll. I went back to Mr. Shannon and he says: "No, because you won't go on the extra board I will not pay you." I said: "Who else must I see?" He said: "Nobody. Try to get it." I said: "I will do my best" and he told that I didn't stand the examination but the papers show for themselves, if he has not tore them up.

Q. Had you had any previous railroad experience?

A. Yes sir.

Q. With what road?

A. L&N Railroad.

Q. Before you went with the NC&StL?

A. Yes sir.

Q. How many years?

A. About two years.

Q. What kind of work were you doing on the L&N?

A. Braking.

Q. The same kind of work?

A. Yes sir.

Q. Was there any difference between the work that you did on the L&N and the work you did on the NC&StL?

A. No sir, not any.

Q. And then you went back to the L&N?

A. Yes sir.

Q. And you are working for them now?

A. Yes sir.

Q. Are you braking with them?

A. No, firing.

By the Court:

Q. When you were cubbing for the NC&StL in the yards how many hours a day did you stay on the job?

A. On the NC&StL?

Q. Yes.

A. Well, I don't know just how many hours because I didn't keep up with the hours.

Q. Well, approximately how many, three or eight?

A. I stayed with the crew, I guess six or eight hours from here to Bruceton.

Q. No, I say in the yards.

A. I didn't work in the yards for the L&N.

Q. When you were cubbing on the line of road for the NC&StL about how many hours did you put in?

A. Oh, maybe eight or nine hours, and on the other, about nine hours on the Cowan local that day.

Cross-Examination.

By Mr. Whitwell:

Q. Mr. Justice, if I understood you correctly, most of your cubbing, while you were cubbing on the NC&StL, was on some trains other than local trains?

A. Yes sir.

Q. And that was the through freight trains that you speak of?

A. Yes sir.

Q. These through freight trains between Nashville and Chattanooga, they would make that run in six hours or less, wouldn't they?

A. I couldn't tell you because I didn't keep up with the time on it.

By the Court:

Q. Well, you could give us some estimate. You said you estimated on the local that you were cubbing about nine hours. You can certainly give some estimate of it.

A. Well, I imagine some of them make it in four, five or six hours, something like that, but as far as the schedule, I don't know.

By Mr. Whitwell:

Q. Well, as a matter of fact, they would make this run in six hours or less, wouldn't they?

A. I wouldn't know.

Q. What is your best judgment about that?

A. I wouldn't say what time it takes for I wouldn't know.

Q. You know it was less than eight hours, don't you?

A. Probably was, some of them.

Q. Now, why wouldn't you make us an estimate there?

A. Because I don't know just exactly how long it took them.

Q. Well, you didn't count the hours that it took the local from Cowan to Chattanooga?

A. We left here about 7:00 o'clock in the morning and got to Cowan about 4:00 is the reason I know what time I made on that, but the others, I didn't keep up with them.

Q. Now, Mr. Justice, about this examination, while it is on my mind, you say you took a written examination?

A. I did.

Q. Do you know whether you passed it or not?

A. Yes sir, I do.

Q. Did you get a report?

A. I will tell you the reason why, because every day the man that give us the examination—there was other men there besides me—and if there was anything wrong with it we had to make it right in the morning and he o.k'ed it before we started on the next day.

Q. Did you get a report from your examination?

A. He okayed it if it was all right. Like today, he okayed that in the morning and if there was anything wrong we had to make that right before he would o.k. that part of it.

Q. Did you see and talk to anybody about that?

A. Mr. Shannon. I carried my lantern and keys up there to him and told him I wasn't working any more. Then was to come back on this Monday and start to having review and I didn't get any money and I didn't see any use my reviewing.

Q. And then this form that is written on the top seemed to indicate you were paid for one day for a physical examination.

A. Well, they have got—what is this first entry, June, 1944?

Q. That was included in this eight days.

A. And then the next entry is June 4th.

Q. Seven days—that is eight days, is that right?

A. Yes sir.

Q. And two of them, being one dead-heading—

A. I received $30.00 and I should have received $40.00. They owe me for about 11 days now.

Q. That is additional then, this shown on here? Those days follow that period when Shannon told you to go back and you would get paid?

A. Yes sir.

Q. So they owe you for 11 days?

A. They owe me for 11 days.

Q. You have never been paid that?

A. No sir.

Mr. Jansen: I don't see any use cluttering up the record with this unless you want it filed.

Mr. Whitwell: I don't care about putting it in. I really want a chance to examine it.

Further this witness saith not.

The next witness, J. B. ALLEN, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. John B. Allen.

Q. How are you employed?

A. I am with the Gallagher Plumbing and Heating Company at the present time.

Q. How old are you?

A. Forty-eight.

Q. You live here in Nashville?

A. Yes sir.

Q. You are a plumber by trade?

A. Yes sir.

Q. How long have you been a plumber?

A. About sixteen years.

Q. Did you ever work or do any cubbing with the NC&StL Railway?

A. Yes sir, I did.

Q. When was that?

A. That was starting December 4, 1944, and ending December 31st.

Q. You have heard the testimony of Mr. Arnold and Mr. Justice?

A. That is right.

Q. Did you run on the same trains that Mr. Arnold testified about, on the same runs?

A. I don't know about the same trains but I suppose the same runs, to Cowan and Bruceton.

Q. Now, I call your attention to your record with the NC&StL Railway and call your particular attention to that part of of the record dated December 3, 1943, addressed to John B. Allen, Student Brakeman, and the schedule. Is that the schedule that was given to you?

A. That is right.

Q. By the Company?

A. That is right.

Q. By Mr. Shannon?

A. That is right.

Q. Did you complete that schedule?

A. No, I missed out on part of the schedule.

Q. Can you tell us how it was you missed out on part of the schedule?

A. Well, after I had cubbed, I think, about a couple of weeks, something like that, I decided I wasn't going any further with it and I stayed out a couple of weeks and went back down to turn in my equipment and Mr. Shan-

Q. After you took this examination did you go on the extra board?

A. No sir.

Q. Never were on the extra board of the NC&StL Railway?

A. No sir.

Q. Did you ever go on the seniority roster of employees of the NC&StL Railway?

A. No.

Q. Now, give me the date of the first day that you cubbed with the NC&StL Railway.

A. The 18th day of June.

Q. What are the regular paydays for the positions of brakemen and firemen?

A. What is what?

Q. The regular paydays. They pay semi-monthly, don't they?

A. I don't know what days they pay; I don't know.

Q. Do you know whether these paydays are on the 10th and 25th of each month?

A. Somewhere around there but I don't know exactly what dates.

Q. Assuming that the first payday was the 25th after you went on on June 18th, you had worked how many days up to that time?

A. I worked the 18th, 19th, 20th and 21st, and then I worked two days one day, and had a Martin turn-around the 22nd and 23rd.

Q. Then you worked six days from the time you started up to the 25th, didn't you?

A. I worked eight days. I worked seven days and one day for examination made eight days.

Q. This one day for examination—that one day you are talking about, that came in at the tailend of your cubbing?

A. No, it came in at the first. That was very short notice because Mr. Shannon told me the day that I filled out my papers—I had done took my examination because Mr. Talley hired me to go on the Huntsville Division and sent me to Decherd and the man down there told me that there wasn't enough work down there to justify me to stay and I come back. He carried me over to Mr. Shannon and Mr. Shannon—I had done taken my examination,

and Mr. Shannon says: "Do you know you get paid for the day you have taken your examination?" I said: "No" and and he reached over and got a card and filled it out and signed his name on it for $5.00.

Q. You are talking about physical examination?

A. That is what I am talking about.

Q. You say you were paid for six days cubbing?

A. I worked the 18th, 19th, 20th, 21st, 22nd and 23rd, and one day, on the 21st, had a Martin turn-around, from Bruceton to Martin on the turn-around.

Q. Well in any event, you worked from the 18th to the 23rd?

A. Yes sir.

Q. You cubbed those days?

A. Yes sir.

Q. You were paid $30.00?

A. $30.00 for eight days.

Q. And you claim now you weren't paid for the day you spent taking your examination?

A. When I made this dead-head trip and the Martin turn-around I come back here and I called up Mr. Talley and told him about the dead-head trip and the Martin turn-around and he says: "Well, you didn't get any experience out of this dead-head trip. We won't pay for dead-heading and the Martin turn-around." I says: "O.k., I will quit right here." I says: "I don't want to have any more to do with you; I will quit." He says: "No, don't you quit." He says: "You go on and finish your cubbing and I will pay you for your two days" and he didn't do it.

Q. What was the date that you received your voucher for those six days that you cubbed and were paid for?

A. I don't remember just what date it was. It was some time while I was cubbing. Some of them asked me if I had been up and got a pay day and I told them no and I went up there. It was a few days after pay day or something, anyhow, it wasn't right on the day and I went up and asked for the check and it was $30.00 and I went over to see Mr. Shannon and told him it wasn't right and he says: "We will make it right. You go on and finish your cubbing" and I taken him at his word and went on.

Q. Now, your quarrel with Mr. Shannon about the cubbing situation and about the day you took your physical examination, did that occur before you completed your cubbing?

A. Yes sir.

Q. You had this misunderstanding or quarrel before you went on and cubbed some more days?

A. He told me if I would go on and finish my cubbing he would pay me for those two days and I went on, and then after I had done my cubbing and taken the examination, I went down to get my money and they said I wasn't even on the payroll, so I went back to see Mr. Shannon and he says the reason I didn't get any money was "because I am not going to pay you for a Martin turnaround and the dead-head trip." I says: "Here is your job. I am through with you." I gave him the key and the lamp and I told him, I says: "Well, who must I see besides you to get this money?" And he said: "Now, you try to get it." I said: "I will do my best" and that is the last talk I had with him.

Q. What was the date of that controversy?

A. About somewhere around the 12th or 15th of July or somewhere right in there; I don't know just what date.

Q. And so you were pretty mad, weren't you?

A. Well, right at that time I guess I was.

Q. Pretty mad, aren't you, now?

A. No.

Q. In a good humor now?

A. Yes sir, that is right.

Q. Do you know whether or not you quit the Company or quit your cubbing, or whatever it was, before the arrival of the next regular pay day when payments were made by the paymaster's office?

A. I quit, it was on—let's see, on the 8th—that was on Saturday and the next Friday was when it was along about pay day time. Anyhow, the rest of them was getting their money anyway and I didn't get any.

Q. Well, you had quit, hadn't you?

A. Yes sir, I had quit.

Q. You had quit?

A. Yes sir, I quit because he didn't pay me.

Redirect Examination

By Mr. Jansen:

Q. Mr. Justice, I am calling your attention to this record. Is that your record with the NC&StL Railway? If you will skip through it and see if it is. (Witness looks through file.)

Q. That top part you didn't write. Let's get down here and see if this is the examination or the application that you filed. (Looking through file.)

A. Yes sir.

Q. Was this the schedule that they gave you here, dated June 17th?

A. Yes sir.

Q. And the dates shown on there are those days you spoke of, the 18th, 19th, 20th, 21st, 22nd and 23rd and so on.

A. Yes sir, seven days there. That was on the Nashville Division with Mr. Crimm. You see this dead-head trip he has got down here but he has left out something there. I don't what it is.

Q. Who wrote in this about the dead-head trip?

A. I wouldn't know who done that.

Q. Something has been rubbed out.

A. Because I think it is signed by Mr. Crimm, but this one down here has been changed.

Q. And this is the schedule dated June 17th starting with June 26th with the signatures.

A. This is a trip with J. D. Phillips and here with E. V. Slater on baggage. One trip on local with V. L. Baker.

Q. Then this form here would seem to indicate you appeared before the examiner, before Pursley.

A. He is the man that gave the examination.

Q. That is dated July 13, 1944?

A. Yes sir.

Q. You appeared there that day?

A. I appeared there on Monday after I made a trip on local, which was the 8th, and that was about the 10th. We started on Monday and it was the 8th when I made trip on the local, which was on Saturday.

Q. Now then, on the top here we have a letter dated July 17, addressed to you. Did you ever get that?

A. Yes sir.

non advised me to go ahead and finish my cubbing, and he told me, he said he thought I had a good chance to make a good brakeman and I showed good promise and all and to go ahead with it. So I started again and cubbed a couple more weeks and quit.

Q. Now, I call your attention to this schedule again, dated December 3, 1943. Can you tell us where you left off, what point?

A. It is checked off here.

Q. Which item is checked off?

(Witness examines record.)

A. This is where I missed out.

Q. You are starting now with December 16th, where you started missing?

A. Yes sir.

Q. And it was from that point on that you missed?

A. Yes sir.

Q. You had cubbed the entire schedule from December 4th, it seems, to and including the 15th?

A. Yes.

Q. Now, the schedule starting with December 16th refers to No. 21, 23, 22, pusher engine and then 23 and 22.

A. I had a new schedule. I started it all over again.

Q. You mean they gave you a new schedule and you started these runs, the remainder of these runs all over again?

A. Yes sir.

Q. I call your attention to this, dated December 1, 1943. Is that the next schedule that they gave you?

A. Yes sir.

Q. And these are the exact runs, except for different dates they were shown that you hadn't completed on the original schedule?

A. Yes sir.

Q. That is signed by the trainmaster, isn't it?

A. Yes.

Q. Now, at the time you finished cubbing did you take an examination?

A. I didn't go through it. I quit before I finished.

Q. At that time did you get paid for this cubbing?

A. No.

Q. Have you since been paid?

A. No.

Q. Have you been paid anything for your cubbing?

A. No.

Q. Do you remember how many days altogether you cubbed?

A. Eighteen days.

Q. And that was started on the 3rd of December?

A. That is not including the day I spent taking the examination.

Q. Now, they have got a notation on the top here saying "Paid for sixteen days." Is that correct? On the top of your record.

A. I cubbed eighteen days.

Q. And you weren't paid anything?

A. No. In fact, I think the record shows eighteen days cubbing.

Q. Yes sir, it shows here eighteen days in December and two days in January.

A. Yes.

Q. And then they say down here: "Paid for 16 days, $80.00."

A. No, I wasn't paid.

Q. You were never paid anything?

A. No.

Q. You haven't been paid yet?

A. No.

By the Court:

Q. What year was that?

A. That was 1943, December, 1943.

Mr. Jansen: Started December 3, 1943, after this so-called arrangement went into effect.

Q. Will you offer this as part of the record in the case, part of your testimony?

A. Yes sir.

Mr. Whitwell: If your Honor please, I have no objection to it going in under the order that you gave in reference to the other. I would say this, I would like the permission of the Court to withdraw the exhibits and bring

them back tomorrow. I would like to have an opportunity to examine them. I haven't had that opportunity.

The Court: Very well, the same order.

Mr. Jansen: Of course, it is your record.

Q. Now, as I understand it, Mr. Allen, you were given the original schedule which showed all these dates and trains that you were to cub on?

A. That is right.

Q. And when you went back to Mr. Shannon he caused you to go back to work and he gave you another schedule which made up the difference?

A. Yes.

Q. Did he ever tell you at any time you didn't have to follow the schedule?

A. No.

Q. Did he tell you any time you could quit and start when you wanted to?

A. No.

Q. He told you to follow the schedule?

A. Yes sir, he told me to follow the schedule.

Cross Examination,

By Mr. Whitwell:

Q. Just two or three questions in that regard. You didn't follow the first schedule that was handed to you after you filled out your application, did you?

A. I did not, no sir.

Q. You lacked a whole lot of following it?

A. Yes sir, several days.

Q. And you cubbed there for a few days and you stayed away from the Railroad for a week, you say?

A. I think it was nearer two weeks.

Q. You just don't like the Railroad work much?

A. No. I didn't intend to go through with the work.

Q. And that is the reason you, after cubbing just a few days, you stayed off a couple of weeks?

A. Well, I was sick when I left the job and that was one reason I didn't go through with the cubbing.

Q. Well, Mr. Shannon, instead of telling you that since

you didn't go through with the schedule that was first suggested to you, that you couldn't cub any more, why, he requested you to cub some more, and finish out your cubbing, didn't he?

A. Yes sir, he did.

Q. And more or less begged you to go on with it; he thought you would make a good man?

A. That is right. He sure did.

Q. And he finally persuaded you to go back?

A. Yes sir.

Q. To cubbing?

A. Yes sir, and I always hated to start something I didn't finish.

Q. And you did come back and cub a while and you just gave it up, didn't you?

A. That is right.

Q. And got you a job somewhere else?

A. Yes sir.

Q. Did you understand, Mr. Allen, when you made your application that if you finished your cubbing that you would be paid $5.00 a day for the cubbing?

A. Well, Mr. Shannon told me the day—the day I started my cubbing he told me that I would be paid $5.00 a day. He had that information for me. Well, he told me, he says: "I have got good news for you. You will be paid $5.00 a day for your cubbing."

Q. Do you recall whether or not he said to you if you didn't complete your cubbing that you wouldn't be paid?

A. No, he didn't say that.

Q. You don't remember that part of it?

A. No sir.

Further this witness saith not.

The next witness, E. W. BUGG, JR., being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is E. W. Bugg?

A. Yes sir.

Q. Have you ever worked for the NC&StL Railway?
A. Cubbed for them, yes sir.
Q. Did you ever get on the extra board?
A. No sir.
Q. How old are you?
A. Twenty four.
Q. Where do you work now?
A. Red Oak Express Company.
Q. What kind of work do you do?
A. Over-the-road truck driver between Nashville and St. Louis.
Q. Did you ever have to cub with them?
A. No sir.
Q. You drive a truck?
A. Yes sir.
Q. Started right in driving the first day?
A. Yes sir.
Q. When was it you cubbed for the NC&StL Railway, do you remember?
A. In 1944.
Q. Do you have some record with you that shows that?
A. Started on the 9/28th.
Q. This record that you have here is dated September 27th, is that right?
A. Yes sir.
Q. Is that a list of schedules?
A. Yes sir.
Q. Who furnished you that?
A. Mr. Shannon.
Q. How many days did you cub?
A. Thirteen days altogether.
Q. Now, you heard the testimony of these other witnesses here?
A. Yes sir.
Q. Were you cubbing as a brakeman?
A. Yes sir.
Q. Did the schedule you had, furnished to you by Mr. Shannon, did that cover substantially the same trains, same kind of trains that Arnold was on?
A. All locals, except one. I made one trip in the baggage car.

Q. You were on all locals?

A. Yes sir, all locals except one.

Q. Did you do the work as here described by Mr. Arnold?

A. Yes sir.

Q. Did you ever get paid for it?

A. I got paid $20.00.

Q. And you worked how many days?

A. I worked twelve days and I was supposed to have gotten paid for the day I taken my physical examination.

Q. That would make how many?

A. Thirteen days.

Q. And you got paid for how many?

A. Four days.

Q. Now, did the Railroad ever give you any kind of notice or anything about what they had paid?

A. Yes sir, they—I got an income tax return. (Handing paper to counsel.)

Q. Have you got it with you?

A. Yes sir

Q. Where did you get it?

A. It was mailed to me by the Railroad.

Q. And that shows you were paid $55.00?

A. Yes sir.

Q. Did you, in fact, receive $55.00?

A. I received $20.00 pay.

Q. Is that all you got from the Railroad?

A. That was the gross pay, $20.00.

Q. I would like for you to offer both of these papers that you have as part of your testimony. Did you ever ask the Railroad for $5.00 for each of the days that you cubbed?

A. Yes sir.

Q. When was that?

A. That was approximately a week or a week and a half after I quit. I didn't quit. I had a motorcycle and I had a wreck on this motorcycle and I had an injured leg and I was laid up and my finances run low so my wife—I was still in bed—she went up there to see about getting my check. Well, the paymaster told her that I didn't have any check. Then she came back and I went the next day and called Mr. Templeton.

By the Court:

Q. Who was Mr. Templeton?

A. He was paymaster.

Q. What did he say?

A. I asked him about my check and he said if I didn't finish my cubbing I didn't get the rest of my time.

Q. And you were in the hospital at that time?

A. No, I was at home.

Q. You were laid up, though?

A. Yes sir.

By Mr. Jansen:

Q. Did you go back again and ask them for it?

A. No, I called him again in about a week from that and asked about it again and he still told me the same thing and then I was getting to where I was able to get around and go to work. Right after that I got a letter from the Railroad asking me if I would finish my cub running and wanted to know if I was ready to take the examination. At that time I had figured if I hadn't got my pay for what I had already done I wouldn't get no more so I went to work somewhere else.

Q. You mean they wrote you a letter asking you if you had finished your cubbing?

A. Yes sir.

Q. And said if you had you should report for examination?

A. Yes.

Q. In the meantime you had gotten a job somewhere else?

A. Yes sir.

Q. Did this cost you any money, any expense, when you were cubbing?

A. Yes, you have your expenses on the road and the expenses while you were on the other end of the line. You had to lay over at the end of each trip.

Q. What kind of expenses were those?

A. Hotel bill and your eating expenses.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Bugg, this $5.00 a day for the four days that you were paid, that took care of your expenses for those days, didn't it?

A. For those four days, yes sir.

Q. Now, you say there was some dispute between you and the Company about how many days you were paid for?

A. No sir, I didn't say that.

Q. Now, you say you were notified that if you finished —or you were notified if you cubbed and quit before you completed your cubbing you wouldn't be paid?

A. Yes, I was notified that after I had already quit.

Q. Now, you said you were told something about being paid $5.00 a day during your cubbing period. You were told something about that at the time you made your application, weren't you?

A. Yes sir. There wasn't any "if" in there. They plainly said I would be paid $5.00 a day for my cubbing.

Q. So whatever he may have meant, you understood from that conversation that you would be paid $5.00 whether you completed it or not? Is that right?

A. That is right.

Q. Now, during this period that you did cub you were cubbing with a regular crew, weren't you, a full crew?

A. Yes sir.

Q. And you were asked, more or less, to adopt the testimony of another witness, Mr. Arnold, I believe it was, in reference to the circumstances under which this cubbing was carried on. This cubbing that you did was to learn, as Mr. Arnold said, learn the road and the duties of the job that you applied for?

A. Yes sir.

Q. Just as he stated. You were cubbing with this regular crew and you did nothing in regard to your cubbing that the regular man wouldn't have done had you not been with the train, did you?

A. No sir.

Q. You say you cubbed a while and quit?

A. Yes sir.

Q. And never did get on the extra board?
A. No.
Q. And never did take a written examination?
A. No sir.

Further this witness saith not.

(Recess.)

The next witness, C. L. HOOKS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?
A. Clarence LeRoy Hooks.
Q. Where do you live?
A. 800 Shelby Avenue.
Q. Nashville, Tennessee?
A. Nashville, Tennessee.
Q. How old are you?
A. Forty-three.
Q. How are you now employed?
A. Fireman, NC&StL Railway.
Q. How long have you been a fireman for the NC&StL Railwey?
A. I established my age 6/27/43.
Q. June 27th, 1943, is when you established your seniority?
A. Yes sir.
Q. Prior to that time were you required to cub with the Railroad?
A. I was.
Q. How many days did you cub?
A. Thirty-one, I believe.
Q. And did you take different runs with the Railroad?
A. Yes sir.
Q. Cubbing?
A. Yes sir. I had a list, in other words, a schedule made up for me for the various runs I was to make.
Q. Did that schedule include all those runs?
A. Yes sir.

Q. Did that include work as hostler helper?

A. Yes sir.

Q. That was done first?

A. Yes sir.

Q. And then the work on the road?

A. Yes sir.

Q. As a cub fireman did you do any work?

A. Yes sir, I did part of it.

Q. What was the type of work you did?

A. Well, the usual work that a fireman would do. In other words, in cubbing you have to take a hold if you ever learn.

Q. Did you take hold?

A. Yes sir.

Q. And do the work?

A. Yes sir, as I could.

Q. What did the other fireman do?

A. Well, he instructed me while I was doing the work.

Q. Did that include work on Diesels?

A. No sir, not with the NC&StL I didn't, steam engines only.

Q. Stoker-fired?

A. Yes sir.

Q. As well as hand-fired?

A. Yes sir.

Q. Were you ever paid for any of the thirty-one days that you cubbed?

A. No sir.

Q. Did you have any expense cubbing?

A. Yes sir, you have your road expense, hotels and eating.

Q. Did you have to pay that expense all yourself?

A. Yes sir, with the exception of maybe a couple of times the fireman would buy my lunch on the other end of the line. I believe it is an old custom with the firemen maybe to help you out on your expense and occasionally buy you a lunch once in a while, something like that. Anyway, they did a couple or three times for me.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Hooks, if I understood you correctly, you did your cubbing prior to June 27th, 1943?

A. That is right.

Q. And back at the time you made your application for the position of fireman and during the time that you were cubbing you understood that you were not to be paid for the time that you spent cubbing, didn't you?

A. That is right.

Q. And you understood, of course, that when you made your application that it was necessary for you to cub or train for a while to learn the duties of the position that you applied for?

A. Yes sir.

Q. And you had several miles of road to learn, didn't you, Mr. Hooks?

A. Yes sir.

Q. You had the mileage from Chattanooga, Tennessee, to Hickman, Kentucky, through Nashville, didn't you?

A. That is right.

Q. And during that cubbing period you had to learn all of the line and how to fire a hand-fired engine?

A. Yes sir.

Q. And you cubbed on different types of stoker-fired engines, didn't you?

A. Yes sir.

Q. And there are some three or four different types of stoker-fired engines, aren't there?

A. Yes sir.

Q. And there are some differences in all of them, aren't there?

A. That is right.

Q. And you had to learn those differences, didn't you?

A. Yes.

Q. And the regular fireman was there and he told you different things about the locomotives, about the water gauges, and taught you different things about how to use those stokers, didn't he?

A. That is right.

Q. And you had no way of getting that information

and learning the activities of a regular fireman without going through that experience and that training, did you?

A. That is correct.

Q. And everything that you did in connection with firing or learning the duties of a fireman was something that the regular fireman was there to do and paid to do, wasn't he?

A. Yes sir, that is right.

Q. And you had no duty and no responsibility in connection with the operation of any engine that you cubbed on, did you?

A. No, not any responsibility.

Q. And whatever you did by way of operating the different appliances on one of those locomotives was done for your benefit in order that you might learn the duties of the job that you hoped to get after that, wasn't it?

A. Yes sir.

Q. Had you had any experience in firing a locomotive at any time before you began cubbing with the NC&StL Railway?

A. No sir.

Q. The whole thing was brand new to you, wasn't it?

A. That is right. I had fired a boiler but not a locomotive, a stationary boiler.

Q. And any train that you fire on would have gotten from where it started to where it went just the same if you hadn't been with the locomotive, wouldn't it?

A. Yes sir.

By Mr. Jansen:

Q. What kind of boiler was it you had experience on?

A. Stationary boiler, marine boilers.

Q. Is there some similarity between firing a marine boiler or marine boiler and a locomotive?

A. Very little, to be exact.

Q. Sir?

A. Very little, to be exact.

Q. What is the difference?

A. Well, there is just a lot of difference, to be exact. I don't know that I could explain it so you would understand it.

Q. Is there any difference in shoveling the coal?
A. Well, yes sir, quite a bit.
Q. How is that?
A. A locomotive is much harder to fire.
Q. Then when you were cubbing on a locomotive shoveling coal and firing you worked harder than you did when you were working on a marine boiler, is that right?
A. That is right.
Q. Did you have to cub for your marine boiler job?
A. No sir.
Q. Or that stationary boiler job?
A. No.

Further this witness saith not.

The next witness, S. T. PORTER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?
A. Samuel Thomas Porter.
Q. Where do you live?
A. 112 Blackburn Drive, Nashville, Tennessee.
Q. How old are you?
A. Forty-four.
Q. How are you now employed?
A. By the United States Department of Labor, Wage and Hour Division.
Q. In what capacity?
A. Inspector.
Q. How long have you been an inspector for the United States Department of Labor, Wage and Hour Division?
A. Since January, 1943.
Q. As inspector of the Wage and Hour Division, United States Department of Labor, did you have occasion to make an inspection of the NC&StL Railway?
A. Not over the entire system; Nashville and Chattanooga only.
Q. And in the course of your inspection of the Nashville

and Chattanooga parts of the NC&StL did you have occasion to examine their records?

A. Yes sir.

Q. Did you find any records at all with reference to cubs, student brakemen, firemen and others?

A. Quite a few in both locations.

Q. What kind of records did you find?

A. In Chattanooga for the most part was ledger records maintained by Mr. Born. Mr. Johnson also had some records in his department, and for the most part, Nashville was personal files of the employees and also some records Mr. Shannon had.

Q. Did those records of those students contain the hours worked?

A. No sir.

Q. Or the amount of compensation paid?

A. In some cases, yes sir.

Q. In all cases?

A. No.

Q. Did you have occasion to take off the record list of all the various cubs, both in office work and road work, who had performed as cubs and had not been paid?

A. I did.

Q. And did anyone with the Railroad help you with that?

A. Yes sir, there was quite a bit of help given me by Mr. Born, Mr. Shannon and Mr. Cunningham, I believe, and then there were a couple of men over in the accounting department, I don't recall their names right now.

Q. Now, with reference to the Chattanooga end, did you take a list of the student callers, messengers, porters, stenographers and clerks who had performed as students who had not been paid?

A. I did.

Q. Do you have that list with you?

A. Yes sir.

Q. And did you have occasion, in taking off this list, to check it with Mr. Born?

A. Yes sir and also Mr. Johnson.

Q. Now, with reference to this particular list, can you find the name of Rosenhiem on that list?

A. Here it is.

Q. And when did you get that list or make it up?

A. It was sometime in October, I have forgotten the exact date.

Q. October what year?

A. 1944.

Q. And the name of Prince?

A. Right here.

Q. And did Mr. Born—did you have occasion to check both of those names with Mr. Born?

A. Yes sir.

Q. In October, 1944?

A. Yes sir.

Q. Will you offer this list as part of your testimony?

A. Yes sir.

(List filed as Plaintiff's Exhibit .....)

By the Court:

Q. What does this purport to be a list of?

A. Cubs at the Chattanooga branch and also the Nashville branch.

Q. And all of them or just some of them?

A. All of them.

Q. And for what time?

A. It won't cover cubs that were paid. It covers only the cubs that were not paid.

Q. Then how could you tell whether they were paid or not?

A. By statement from Mr. Shannon and this checked over in the auditing department and statement from Mr. Born at the Chattanooga office.

Q. Did you check to see whether any vouchers had been issued to these people?

A. No, I took the word of Mr. Born for it in the Chattanooga office and I did check vouchers in the auditing department.

Q. Well, did they show that these people had not been paid and were not going to be paid?

A. Yes sir.

Q. Why not?

A. They didn't show that they were not going to be paid. I don't know whether they were going to be paid.

Q. Well, you have heard that down at Chattanooga they made a mistake and they rectified that mistake now as far as possible. What about that in connection with this?

A. Well, I didn't discuss at the time with them as to whether they were going to pay them or anything about it. I was simply making a routine wage and hour inspection.

Q. Did you find that they were keeping record on these cubs as required by the rules and regulations?

A. Not accurate records, no.

Q. What?

A. No, not accurate records.

Q. They say now they pay the cubs—not cubs but the posters—in the office under the Wage and Hour Law. Did you find that to be true?

A. Not at the time of my inspection.

The Court: All right. Go ahead.

By Mr. Jansen:

Q. Now then, the list that you have handed in just includes the Chattanooga list, does it not?

A. That is right.

Q. Did you also make a list of the cubs in Nashville who had not been paid?

A. Yes sir, according to the records maintained in Mr. Shannon's office. I didn't pull all the personal files, every one of those, but the records Mr. Shannon had, I did make that list from.

Q. Will you file that as part of your testimony?

A. Yes sir.

(Filed as Plaintiff's Exhibit No. ——.)

Q. Now, I notice in connection with the list on the Chattanooga branch of the Railroad you have certain dates. Will you explain what those dates are?

A. Those dates were the dates the cubs were posted.

Q. You mean that was the last day?

A. That was the date they were posted on the board for work.

Q. Put on the extra board?

A. That is right.

Q. So that whatever cubbing or posting was done by them was done prior to that time?

A. Yes sir.

Q. And the dates on the Nashville part?

A. That was the date of the application, in this column here, and the date of the cubbing would have to be verified from the personal files.

Q. I notice on the Nashville part you have the heading: "Students who did not complete cubbing."

A. They were students or cubs who took part time cubbing and were not competent, according to Mr. Shannon's records.

Q. Well, is that true with reference to all of them under that heading, even those in early 1943, if you know?

A. I think so.

Q. And in the year 1942?

A. I think so.

Q. So there would be a number of cubs who might have completed their cubbing you didn't take any record of?

A. Yes sir.

Q. And did you determine at that time as to those who completed their cubbing prior to December 1st, 1943, brakemen or switchmen or firemen, that had been paid anything?

A. In some instances they had been paid.

Q. Prior to December 1st, 1943?

A. No, they hadn't been paid.

Q. None of those who had completed cubbing prior to that time had been paid?

A. According to statements made in the office.

Q. And this is a list of those prior to that time who hadn't completed their cubbing?

A. Yes sir.

Q. And since that time who hadn't completed their training and hadn't been paid?

A. Correct.

Q. Now, was it possible, Mr. Porter, with reference to the employees at Chattanooga to determine from the records, as to office employees, how many days they had posted?

A. No.

Q. Well, did you get any information at all about that?

A. Mr Born said that he was very familiar with the records and work of the employees and he could tell me approximately how many days they cubbed and the records were made on that day from statement made by him.

Q. Mr. Born has told us that—

A. Mr. Johnson—pardone me—also participated in the firemen, I believe, as to the time they cubbed.

Q. Mr. Born has told us that Mr. Rosenhiem cubbed fifteen days. Is that right? Do you recollect that? (Conferring with associate.)

A. I can find that for you.

Q. No, I was trying to recollect the testimony. My recollection of Mr. Born's testimony was that Mr. Rosenhiem cubbed for fifteen days. Did he give you any other figure during the time you were there?

A. I would have to check the files.

Q. Would you like to check them now?

(Witness checking the files.)

A. The time stated when I met him, the time, the maximum was twenty one days.

Q. At the time you made your inspection?

A. 5/16/44.

Q. He told you twenty one days?

A. Twenty one days.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Porter, just a few questions. I understand that you made this inspection at Chattanooga in reference to persons who had posted there as clerks, yard clerks, callers, stenographers, messengers and porters back in October, 1944?

A. That is right.

Q. When you went there to make that investigation and went to Mr. Born's office was he quite cooperative with you about the hours in the office and any information that you desired?

A. His attitude was satisfactory.

Q. Such records as you called for, were they furnished you, if they were available, if he had them?

A. Yes sir.

Q. And you say he did give you his best recollection as to the posting period of any person you might ask about?

A. Yes sir.

Q. And it was from him that you got this list of persons who had posted at Chattanooga over the period that you were inquiring about?

A. With the addition of Mr. Johnson, I also got a record from him.

Q. Who is Mr. Johnson? I am not just familiar with him.

A. I am not so familiar with him myself. As I recall, he is another chief clerk down there in charge possibly of the firemen.

Q. And so you got your information with reference to these persons that we have been calling posters here, you got that from Mr. Born?

A. Yes sir.

Q. And the information which you got in reference to firemen was gotten from Mr. Johnson?

A. That is right.

Q. Now, Mr. Porter, have you made any investigation by either of these records in reference to posters and in reference to cubs since October, 1944?

A. Well, there was a small check made there, I would say, six or eight hours spent in the Chattanooga office.

Q. Now, if I understood you correctly, back at the time that you made this investigation in October, 1944, you took the list of persons, in reference to posting of persons, who had posted over the period about which you were inquiring and went to work on the dates shown on this Chattanooga Exhibit of yours, and were informed by Mr. Born at the time that these people had not been paid in accordance with the—had not been paid for the period of their posting?

A. Yes sir.

Q. Now, I believe you said you had not made any investigation recently or at all to determine how many of

those persons whose names you obtained from Mr. Born had been paid for their period of posting?

A. I haven't made an inspection since that time.

Q. And so if vouchers have issued for all those people you haven't checked to find out whether or not that is true, have you?

A. No.

Q. Do you know whether or not, back in February, vouchers were issued to a large number of the men appearing on this list in payment in accordance with the minimum provided by the Wage and Hour Law for the period while posting?

A. No, I haven't made an inspection since October, 1944.

Q. And you are not now in position to say, Mr. Porter, that the Railroad, as a result of your investigation and this lawsuit, has made a list and undertaken to go back and pick up and pay for the period of posting, which the Railroad contends, or its management, that was being done at the time?

A. No, I haven't checked their books since October, 1944.

Q. And you don't, therefore, know that that situation at Chattanooga, which the Railway claims was an oversight or failure to carry out instructions, you don't know that that has not been corrected already?

A. No sir.

Q. Did it take you some little time up there to make your inspection?

A. Quite a while, yes sir.

Q. This business of going through records is a rather laborious and time-consuming thing, isn't it?

A. Well, just routine inspection work.

Q. Now, did you at Chattanooga undertake to give a list of all the persons who had cubbed there for positions of firemen and switchmen in the Cravens Yards at Chattanooga?

A. Yes sir.

Q. And you think you have included all of those in this list?

A. I have all that were on Mr. Born's books at that particular time.

Q. Well, you have got your list of those who had cubbed for the position of fireman, you got them off Mr. Johnson's record?

A. Yes sir.

Q. And this exhibit, this Chattanooga exhibit, we will call it, these dates here, do they purport to show the dates that the men went to work after completing the cubbing period? Is that what they represent?

A. That is correct.

By the Court:

Q. What date is that, which column?

A. That is, I think you have the wrong one.

Q. Which column?

A. This column here (indicating).

Q. You say that is the date?

A. Yes sir.

Q. That is the date they are supposed to have finished their training and sent on the seniority list?

A. Yes sir.

By Mr. Whitwell:

Q. And on that date in that column, both for persons who posted and who cubbed for train service in the yards there, those dates represent the dates when they went on the seniority roster or established their seniority as employees, is that right?

A. Yes sir.

Q. Now, your Nashville list, if I understand this exhibit correctly, it is a list of persons who cubbed for positions in train service and who quit or who did not complete their training or cubbing?

A. Yes sir.

Q. I believe you say you made no list of those who cubbed over the period involved here and who did complete their cubbing and become regular employees?

A. That is correct.

Q. And you made no investigation as to those who applied for positions of firemen or brakemen in road service, or switchmen, if applicable, who were paid for the days that they cubbed since December 1st, 1943?

A. Now, state that question over.

Q. I say you didn't go in and undertake to ascertain the number of people who cubbed since December 1st, 1943, and whether or not they had been paid for the days that they cubbed?

A. I went farther back than that.

Q. How far back did you go?

A. I believe it was 1941.

By the Court:

Q. Did you make any record of those who completed their training and had not been paid this $5.00 a day?

A. No.

Q. You havent got that list?

A. I don't have a list.

Mr. Whitwell: That is what I was asking about.

Q. It was along about 1941 with this war period getting hot; that was about the period when they began putting on these people, they began cubbing for positions and there were vacancies of regular employees, that is about the period, isn't it?

A. I wouldn't say. I don't know anything about the employment situation there.

Further this witness saith not.

Mr. Jansen: Now, if it please the Court, we have a few other witnesses but I think their testimony would be more or less cumulative and in view of the wishes of the Court, I will refrain from calling them at this time.

The Court: I don't want you to feel unduly restrained. I want you to put your case on but I just don't see any point in piling up a lot of cumulative testimony after the picture has been thoroughly established, but I don't want you to feel that I am cutting you off from putting on witnesses.

Mr. Jansen: I understand, your Honor, I can reserve them, if necessary, for rebuttal, if we think it is necessary.

The Court: Are you ready for the Defendant? I understand you rest?

Mr. Jansen: Yes, your Honor, plaintiff rests.

Mr. Whitwell: The last statement he made was that he probably would reserve a lot of this testimony in chief for rebuttal. I would like very much for this testimony in chief, that it come as testimony in chief and that testimony in chief not be used for rebuttal purposes.

The Court: Well, if there is anything new about it, I will see that you are not taken advantage of.

Mr. Whitwell: I am sure of that. Now, if your Honor please, I suppose I could proceed but we are here at the half way mark. I understand your Honor quits at 4:30. I am not someone to make the request but it would be a great accommodation if we were permitted—

The Court: How much time do you think you are going to require for your testimony?

Mr. Whitwell: Of course, that depends a lot upon the cross-examination. I have the feeling now that we can complete it tomorrow.

The Court: Tomorrow is Friday and I understand it is not the custom to hold court on Saturday and it will have to go over until Monday if we don't finish tomorrow. About how many witnesses do you think you will have?

Mr. Whitwell: I will have some ten or twelve.

The Court: Are there any so-called long witnesses amongst them or are they all of reasonable duration?

Mr. Whitwell: Well, if your Honor please, I will have the superintendents of the two divisions. I will have a couple of chief clerks and I would think the balance of them would be very short witnesses on the actual practical operation, which is pretty well in this record anyway.

The Court: All right. We will take a recess now until 10:00 o'clock tomorrow morning and be ready then and have your witness on the stand.

Thereupon an adjournment was taken until in the morning at 10:00 o'clock.

EVIDENCE ON BEHALF OF THE DEFENDANT.

J. W. TUCKER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Is this Mr. J. W. Tucker?

A. Yes sir.

Q. Where do you live, Mr. Tucker?

A. Chattanoga.

Q. How old are you?

A. Sixty-nine years old.

Q. What position do you hold with the NC&StL Railway?

A. Superintendent of the Chattanooga Division and the Huntsville Division.

Q. How long have you been superintendent of those divisions of the Railway?

A. Four years.

Q. What position did you hold with the Company prior to the time that you were appointed superintendent, immediately prior to that time?

A. I was assistant superintendent for about twenty-three years.

Q. Was that at Chattanooga?

A. Practically all that time. I was at Nashville seven or eight months the latter part of 1918 and the first part of 1919.

Q. Now, Mr. Tucker, I want to ask you a few questions in reference to the situation as regards what is termed in this record as posting by persons for the positions of porters, callers, messengers, clerks and stenographers. Did you hear Mr. McWhorter testify in respect to the fact that back in the early part of the '40s, about 1940, he issued instructions to his superintendents to pay posters during the period of their posting the minimum provided by the Wage and Hour Law and to keep records of the days and hours of such posting?

A. Yes sir.

Q. Did you get those instructions from the General Manager's office and from Mr. McWhorter?

A. I did.

Q. Now, in turn, did you at the time issue those instructions on down to your subordinates or those who took instructions from your office?

A. Yes sir.

Q. Now, Mr. Tucker, as far as you know and as far as you knew, were those instructions carried out at the various other places over your two divisions of the Railway except at Chattanooga?

A. They were.

Q. When did you first learn that your instructions, as you have stated, had not been carried out at Chattanooga?

A. It was when notice came out in the Chattanooga Times when suit was filed against the Company.

Q. Now, when this suit brought to your attention that there was a controversy about posting at Chattanooga did you immediately proceed to make an investigation?

A. I did.

Q. Did you find from your investigation that your instructions had not been carried out?

A. I did.

Q. At Chattanooga?

A. I did.

Q. You know Mr. J. E. Born, who testified here, I believe, on Wednesday in this case?

A. Yes sir.

Q. Is he the clerk in the yardmaster's office there at Chattanooga?

A. He is chief clerk to the yardmaster.

Q. Had you given him those instructions back when you first received them to pay posters for the period of their posting and to keep records of the time when posting?

A. I did.

Q. Now, when you learned that Mr. Born had either misunderstood your instructions or had overlooked them did you reprimand him for not having carried them out?

A. I discussed it with him. Yes sir, I did.

Q. Did you then instruct Mr. Born to furnish you a

list of people who had posted prior to the period involved in this litigation and who had not been paid and to give you a record, as best he could make it up, of the time of their posting?

A. Yes.

Q. Now, when you got that list of those who had posted prior to the time here involved without being paid did you furnish that list to the accounting department here in Nashville with instructions to issue vouchers for those people for their time posting, which you had up to that time thought had been paid currently?

A. Yes sir.

Q. Now, so far as you know, have those vouchers been issued in compliance with your instructions to the accounting department?

A. So far as I know, they have.

Q. If vouchers haven't been issued for some of them will they be issued?

A. They will, yes sir.

Q. Is it not the present practice of the Company, regardless of mistakes in the past, to pay posters currently the minimum provided by the Wage and Hour Law and keep records of the days and hours posted?

A. It is.

Q. Do you now say that the situation at Chattanooga has been corrected?

A. It has.

Q. Now, has the practice that you instructed the people under you to carry out on your divisions in reference to posting been carried out on other parts of the system, as far as you know?

A. They have.

Q. Now, something was said about Mr. Curtis Bomar, who posted at Fayetteville for a period and who was later employed and who is now employed as a clerk for the Company. Can you explain why Mr. Bomar was not paid at the time and hasn't been paid yet, if he has not, for the time while he was posting?

A. I can't account for it unless it was just an oversight in filing his papers but when I found that he had not been paid—I learned it just before I took the train

for Nashville—I immediately wrote Mr. Bomar to give me the dates of his posting and the hours posted each day.

Q. Did you also instruct your chief clerk there in your office to make an investigation and undertake to ascertain why his name had not been turned in and the period which he had posted?

A. I did.

Q. Was that for the purpose and with the honest intention of correcting that oversight?

A. Yes sir, and to prevent it in the future.

Q. Do you expect to do that?

A. I do.

Q. Now, outside of Mr. Curtis Bomar, do you know of any other single person who has posted over the period covered by the Wage and Hour Law or Fair Labor Standards Act who was not paid currently for the period of his posting?

A. So far as I know, they have all been paid.

Q. Now, Mr. Tucker, I understood from a witness, from Mr. Born, I believe, that the Company's practice in reference to delivering vouchers is that it will not mail a voucher to a person to whom it is made out unless the Company has written authority from that person to mail the voucher to him?

A. That is true.

Q. Now, in reference to these vouchers that have been issued to go back to make payment to these posters who were not currently paid did the paymaster at Chattanooga and elsewhere on your system hold those vouchers just as they hold other vouchers?

A. They do.

Q. What do you expect to do, if anything, in reference to giving notice to people who have vouchers at the paymaster's office, and especially in cases where they are not expecting them?

A. I am going to notify every person who has not called for their voucher that they have a voucher—that we have a voucher for them and to call and get it, and if they can't call and get it but will give me their home address and ask that we mail it to them, we will mail it

to the home address. I intend to do that just as soon as I get back to the office.

Q. In other words, you don't have any trouble about the fellow who is expecting a voucher getting it because—

Mr. Jansen: If the Court please, I think that is highly argumentative. I haven't objected to counsel's leading questions up to now but I think that question is highly argumentative, leading and suggestive. This is his own witness.

The Court: Overruled; go ahead.

By Mr. Whitwell:

Q. In other words, a person, Mr. Tucker, who is expecting a voucher, why, there is no trouble about your practice in reference to him either coming for the voucher or mailing it, if he requests it?

A. No.

Q. But in cases like this where a person probably is not expecting a voucher, you intend to issue instructions to get in touch with those people through the paymaster's office, get in touch with them and notify them that they have a certain voucher awaiting them?

A. Yes.

Q. Now, Mr. Tucker, in reference to this policy about which the General Manager testified Wednesday adopted December 1st, 1943, of paying persons who cubbed for positions of switchmen, brakemen or firemen $5.00 a day, I will ask you if you received instructions on or about November 30, 1943, to that effect, and if you received a letter, copy of which Mr. McWhorter introduced as exhibit to his testimony in this case?

A. I did.

Q. Now, as I recall that, the instruction, as shown in that letter, was addressed to the superintendents of the various divisions to pay persons while cubbing $5.00 a day, is that right?

A. Yes sir.

Q. Now, shortly thereafter I will ask you whether or not the General Manager issued instructions modifying those so as to provide that a person would be paid $5.00

a day during the period of his cubbing, provided he did not voluntarily quit, or provided he completed his cubbing?

A. That is right.

Q. Now, since December 1, 1943, when this policy of paying cubs $5.00 a day was adopted have you kept the names and records of all persons who cubbed for positions of switchmen or firemen in yard service at Chattanooga, and have you turned in to the accounting department currently the names of all those persons and the dates and sometimes the hours that they spent in cubbing in all cases where you did not know that they had quit or intended to quit cubbing.

A. That is right. We have, yes sir.

Q. Do those persons, while cubbing, do they keep a time card or something like that showing the days cubbed and the trips?

A. Yes sir, they are required to make out a time card which shows the hours worked and then that ticket or card is okayed by the foreman of the engine he works with and that is turned in to the general yardmaster or chief clerk of the yardmaster, and that is turned in to the accounting department at Nashville.

Q. At Nashville?

A. At Nashville, for payment.

Q. Now, so far as you know, since December, 1943, have all those names and the periods of their cubbing, those time tickets you spoke of, gone to the accounting department as to all those who were undergoing a cubbing period and who you didn't know had quit or would quit?

A. Yes sir.

Q. Were those sent in currently?

A. Yes sir.

Q. Were vouchers issued currently for all of those people?

A. So far as I know they were.

Q. Now, the people who were not turned in currently to the accounting department, were they people who had cubbed for a while and you learned that they had quit, had not completed their cubbing and, therefore, had not been paid?

A. Yes sir.

Q. Now a few months ago, back around the first of the year, I will ask you whether or not the General Manager's office gave the superintendents further instructions to the effect that some of these applicants claim that they misunderstood the instructions, who were under the impression that they would get $5.00 a day regardless of whether or not they completed their cubbing, and the General Manager instructed the superintendents to turn in the names of all who had cubbed and quit their cubbing and whose names had not heretofore been turned in to the accounting department, with instructions that they go back and be picked up, so to speak, and paid for the days of their cubbing?

A. Yes sir, I received those instructions.

Q. Now, did you comply with those instructions and have those names all been sent in?

A. I did.

Q. Now, do you know whether or not vouchers have been issued to cover those people?

A. I am told they have been.

By the Court:

Q. Do you now pay cubs $5.00 a day regardless of whether they complete their cubbing or training or not.

A. We do.

Q. Even if a man comes and works one or two days and then quits, you pay him $5.00 a day for those days?

A. Yes sir.

Q. How long has that policy been in effect?

A. Soon after—I am not sure as to the date the General Manager issued those instructions.

Q. Well, about when?

A. I believe it was January of this year.

Q. Is that the policy to be followed now and in the future?

A. Yes sir.

The Court: All right.

By Mr. Whitwell:

Q. If that policy is to be changed, I take it it would be changed by the General Manager's office?

A. The General Manager would have to issue instructions to change it.

Q. Now, I want to ask you a few questions about this cubbing practice.

Mr. Whitwell: I am trying to be as brief as possible, your Honor.

Q. Has the NC&StL Railway had a policy of requiring written applications, physical examination and cubbing, and written and oral examination following cubbing as a preliminary step to the employment of persons for the positions of firemen, brakemen and switchmen?

A. Yes sir.

Q. Is that a practice of long-standing with this Railway?

A. Yes sir.

Q. Is it a practice and custom of long-standing among railroads generally throughout the country?

A. I am informed and understand it is.

Q. Now, Mr. Tucker, do you give general instructions to the people who have charge of receiving those applications as to receiving the applications and advising the applicant that he will have to go through this cubbing period and the physical examination and those things?

A. Yes sir.

Q. Generally speaking, take the position of switchman, for example, why does the Company require a person to cub before it will consider him qualified and before it will employ him?

A. It is necessary, if he hasn't had previous experience, that he learn the different signals. He must learn the location of the tracks, the location of the different switches and industries in the different districts and know how to take care of himself and avoid injury and learn to keep cars in side tracks and off the tracks and avoid injury or damage, and to learn whether the yards are on grades or level, know how cars must be handled in switches to avoid damage to them and where there are signals in connection with the yards, that is, interlocking plants; he must know all them.

Q. Does he undergo his cubbing or training with a regular crew, what we call a full crew of regular employees?

A. Yes sir.

Q. Whatever activity that he performs in connection with his training, is that for his benefit that he learn the job that he has applied for?

A. Yes sir.

Q. Is such person even considered by the Company as an employee during the period of his training?

A. No.

Q. Does his training advance the work or is it a burden in any way to the Company during the period of his cubbing?

A. No, it is not.

Q. Does he have any duty or any responsibility whatsoever in connection with the railroad operations?

A. No sir.

Q. Now, I understand that as to a regular employee, if there is some infraction of a rule, he may be disciplined by being given what you call demerits or record suspension. Does anything like that apply to a person while cubbing?

A. No sir,

Q. Now, in reference to road service, candidates or cubs for positions in road service, I understand that a person who applies for a position in road service makes application here at Nashville for the Chattanooga Division and for the Nashville Division?

A. That is true.

Q. You are familiar, I take it, with the roadbed and physical conditions between Nashville and Chattanooga, which is your division?

A. Yes sir.

Q. Now, as to road service cubs, is it necessary that they undergo a training period such as you have described in reference to switchmen?

A. Yes sir.

Q. Are there quite a few towns between Nashville and Chattanooga, yards, side tracks, switches, and block signals that a regular brakeman has to know and a regular fireman has to know and that a cub has to learn?

A. Yes sir.

Q. Does that person who cubs for the position of brakeman or fireman in this road service, does he also cub with a full crew of regular employees?

A. Yes sir.

Q. Is he taught by those regular men and does he observe their work and also actually perform some of it in the course of his training in order that he might learn the duties of the position which he hopes to get later on?

A. He does.

Q. You have been talking about the necessity of a person cubbing for a period for the position of switchman and you have given some of the reasons why it is necessary that such cubbing be carried on. Is what you have said as to switchmen also true, even more true as to candidates for positions of firemen and brakemen in road service?

A. It is.

Q. Do the same reasons why a cub must—why a person must cub for the position of brakeman in road or yard service, do those same reasons obtain as to why it is necessary for a person applying for the position of fireman must also undergo a cubbing or training period?

The Court: I think you have made that situation very clear, Counsel. I understand that.

Q. What about that class of employees that you call posters? What is the necessity for their undergoing posting and training?

A. They fill clerical positions and there are so many different types of work in our offices that they must learn that it is necessary for them to go in and learn or get a fairly good idea of it.

Q. What about janitors and porters?

A. Well, janitors, some of them look after some of our matters in addition to the offices and other work they wish them to do, and it is necessary for them to learn where they have to do the work and just how it is done.

Q. Some of these people that look after this have to go out in the yards and be out amongst operating trains?

A. Yes sir, some clerks are inside clerks and some of them are outside clerks that get tonnage, check refrigerator cars to see whether they need icing, get the seals of

cars arriving, initials and numbers of cars, how they stand in the train and mark them.

Q. Do you find from your experience that a green hand can't do that?

A. Yes sir.

Q. It takes training to do that?

A. Yes sir.

The Court: I think I understand that, Counsel.

Mr. Whitwell: I want to ask one more question, one or two, and then I am through.

Q. Persons who apply for positions of brakemen or firemen in road service, after they undergo this training or cubbing period, are they always required to take a written and oral examination and pass it before they qualify for employment?

A. Yes sir.

Q. Now, normally and when practicable, is that true also as to persons applying for positions as switchmen or firemen in yard service?

A. We try, when a cub has completed his training, to have the train rule examiner examine this man. During this war period it has been at times impossible to do that because we had so many men on the main line, more important, and he couldn't come to Chattanooga to examine those men immediately but would go as soon after as he could, but just as soon as we can get the train rule examiner up there we do examine those.

Q. Now, as I understand it, trains on the main line of road always run under train orders but engines in yard service, they don't switch by any train orders, do they?

A. No.

Q. Do men in yard service have fewer rules to contend with than those in road service?

A. Yes sir, they do.

Q. And so, if I understand you, where practicable it is desirable that they first undergo this examination but in these war times it is practically impossible to meet that desire at all times and frequently persons are put on the

roster of employees in switching service before they have taken this examination?

A. Yes sir, although they are putting on an additional train rule examiner to try to keep up.

Cross-Examination,

By Mr. Jansen:

Now, if it please the Court, before I begin the cross-examination of this witness, so that there will be no question about the position of the Plaintiff and that we can save time, I would like to state at this time that if the Defendant will, in open court, freely, fairly, openly and unequivocally admit that the people or persons who, while posting for this office work and while cubbing for the jobs of switchman, brakeman and fireman are employees under the Fair Labor Standards Act, and if they will also, in open court, unequivocally agree to comply with the Fair Labor Standards Act as to those employees in the future both as to the minimum wage requirements and regarding the keeping of records, then I would ask the Court for leave to dismiss this case.

The Court: All right, Counsel, what do you say to that?

Mr. Whitwell: If your Honor please, we don't make any such statement. Our position is stated in our answer. We don't think these people are employees and that such payments as have been made have been what has been explained as incentive payments and we do not make any admission at all that these persons are employees or that persons, while cubbing, are employees. We have simply elected to treat posters as if they were employees and, therefore, I respectfully decline to make any such admission as we are called upon to make.

Mr. Jansen: Very well.

Q. Mr. Tucker, where are your offices?
A. Over the Union Depot, Chattanooga.
Q. And where are the offices of Mr. Born?
A. Cravens Yard.
Q. Do you ever get out to the Cravens Yard?
A. Yes sir.

Q. Do you have occasion to be out there quite frequently?

A. Well, I go as often as I can.

Q. Would you say you are out there daily?

A. No.

Q. How many times, on the average, a week would you go out there?

A. Some weeks I don't go at all and sometimes it is twice a week, I mean two weeks.

Q. Now, do your duties of the Chattanooga and Huntsville Divisions include the supervision of the Cravens Yard?

A. Yes sir.

Q. And the yardmaster, master mechanic and trainmaster in that yard are under your supervision?

A. Yes sir.

Q. And the chief clerk for the yardmaster is under your supervision?

A. Yes sir.

Q. Now, do you have a copy of the instructions that were given to you back in 1941 to pay these persons who were posting at least forty cents an hour or whatever the minimum wage under the Fair Labor Standards Act was?

A. I couldn't say whether I have or not.

Q. Do you recall whether you received written or oral instructions?

A. I received instructions, I am sure. I know we discussed it once or twice orally with the Assistant General Manager at that time, acting General Manager now, what those men would be paid.

Q. Now, how far is the Cravens Yard from your office?

A. It is a little more than a mile.

Q. And do you have occasion to be in the Cravens Yard often from time to time and see who is working there?

A. When I am out and go into the office. Sometimes I go out there and don't go into the office.

Q. You know a lot of people by their first name, I imagine?

A. Yes.

Q. And I have no doubt but what you would know if a

stranger were working in one of those offices, wouldn't you?

A. Well, yes sir, I would guess I would notice any stranger.

Q. Don't you ever recall during that period seeing a new man working there and inquiring about him?

A. I don't recall; I might have.

Q. Don't you recall ever during that period having it called to your attention one way or another, as superintendent of the Chattanooga and Huntsville Divisions, that there were people posting in the office at Cravens Yard?

A. I knew that from talking with the chief clerk, Born, that he had men posting and learning jobs out there; I knew that.

Q. And didn't you know, as superintendent of those divisions, that those men were not being paid for that posting?

A. No sir.

Q. Didn't you have occasion to check the payrolls?

A. No sir, I don't check them.

Q. How is it then that you send in the payrolls on these cubs to the department, auditing department, for payment?

A. When it was brought to my attention that they had not been paid we instructed the heads of the departments to prepare that list of men and submit to me and that list is submitted, and I had to sign it, o. k. it and send it in, but I don't check the payrolls.

Q. Now, Mr. Tucker, have you seen this list of names which has been filed as Plaintiff's Exhibit No. 7?

A. No, I haven't seen this.

Q. Just look over the list. (Handing paper to the witness.) Do you know any of the men on it?

A. No, I don't.

Q. You do not?

A. No sir.

Q. In connection with your men on the road you have certain rules and regulations that your men must follow, don't you?

A. Roadmen?

Q. Yes sir.

A. Yes sir.

Q. And men in the switching service also?

A. Yes sir.

Q. And do you have rules and regulations that you require your office help, that is, your chief clerks to follow?

A. Yes sir.

Q. Now, suppose a man on the road is found to have violated some of the rules, do you discipline him?

A. We hold an investigation and after holding an investigation, if we find he has violated a rule, we take disciplinary action.

Q. What would that disciplinary action be?

A. It would be a record suspension, or, if it was a pretty bad case, it might mean removing him from the service.

Q. For example, a man that had been engaged in a fight might be removed from the service?

A. Yes sir.

Q. But a man who violated a rule that required him to travel ten miles an hour across a bridge and he traveled, instead, eighteen or twenty miles an hour, he might get a few days suspension?

A. Well, he might and he might not.

Q. Well, if you found him guilty of violating that rule?

A. Yes sir.

Q. You would suspend him for a couple of days?

A. No, not suspend him—issue—it is a record suspension.

Q. You take him out of the service?

A. It is a book suspension that we issue against his record, so many days record suspension. If it was just ten, it would be ten days record suspension.

Q. Now, suppose a chief clerk violates one of your rules and regulations, do you discipline him in the same way?

A. Never have, no sir.

Q. You never have?

A. No.

Q. No matter how serious it is?

A. Well, I haven't had any that was so very serious.

Q. You haven't had any that was so very serious?

A. Nothing but what a verbal reprimand would do as well.

Q. Now, in the case of Mr. Born, did you discipline him in any way for this violation of instructions?

A. No sir, but I have reprimanded him.

Q. You didn't think it was very serious?

A. There are several things to consider whenever it comes to discipline. During this war period it is very hard to get men. Mr. Born is a very efficient chief clerk in many respects and I didn't feel that I should remove him from the service but I did reprimand him verbally.

Q. As an efficient chief clerk you mean he is able to handle things in the office pretty well?

A. Yes sir.

Q. He is thoroughly familiar with all of your rules, regulations, instructions, etc.?

A. Yes sir.

Q. Except the one regarding the Wage and Hour Law, is that right?

A. That is right. He made a mistake there.

Q. Well, you mean to say, Mr. Tucker, that during all these years when that entire list of men were down there cubbing or posting without pay that never, during all that time, was called to your attention?

A. It was not.

Q. Did you hold an investigation on Mr. Born?

A. About his failure to do this?

Q. Yes sir.

A. I did not.

Q. You didn't even have an investigation?

A. No.

Q. The ordinary investigation with reference to men on the road is an investigation that is made in writing; isn't it?

A. With Mr. Born I didn't think it necessary to do that and I thought the action I had taken would prevent a recurrence and that is usually what discipline is for.

Q. So the only thing you did was to talk to him about it and give him a reprimand?

A. Yes sir.

Q. You didn't discipline him for any length of time?

A. No.

Q. Now, Mr. Tucker, how is it that you have waited until now to notify these employees by letter that they had this money coming?

A. I didn't know that these checks had not been delivered until I came down to Nashville to this hearing. I was told yesterday or the day before and that was the first knowledge I had of it.

Q. You didn't check at any time to see whether or not the checks that you had requested to be delivered had actually been delivered?

A. I never do.

Q. Now, all of this with reference to the payment of these office employees has all been done since this suit was started, hasn't it?

A. Yes sir.

Q. Do you have any written instructions with regard to the payment of these employees?

A. When the suit was filed I immediately notified counsel and the acting General Manager and the acting General Manager immediately wrote me with reference to it to try to have a list prepared for every man that had not been paid and see that they were paid, and I immediately—had had the instructions for some time, I can't say how many days right now before I got the instructions—and then compiled a list of all these employees and tried to arrive at the hours. It was quite a big job.

Q. You heard the testimony of Mr. Porter that he had gone over all this list with Mr. Born that he had down there in October?

A. Yes.

Q. And that Mr. Born had given him the number of of days?

A. Yes sir.

Q. Did you know that the Wage and Hour Department, the Wage and Hour Administrator's representatives were making an investigation in October?

A. No sir. The first I knew of that was sometime after he had been down there. I don't know who he was. And they came to see me—I guess it was him, some man up here and called to see me.

Q. Before the suit was started?

A. Well, I was out of town, just a little while before the suit, and the next I knew that he had been at the yard office making a check was after the suit was filed and then some of them told me there was a man out there making this check and I don't think they ever realized what he was checking for.

Further this witness saith not.

The next witness, M. O. ARMSTRONG, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Where do you live, please sir?

A. Nashville.

Q. What position do you hold with the NC&StL Railway?

A. I am superintendent of the Nashville and P&M Divisions.

Q. How long have you been superintendent of the Nashville and P&M Divisions?

A. Approximately eight years.

Q. Mr. Armstrong, I will ask you if you heard the testimony of Mr. McWhorter on Wednesday when he testified that back sometime about 1940 he issued instructions to the various superintendents to pay persons who posted for positions of porter, caller, messenger, stenographer or clerk an amount equal to the minimum provided by the Wage and Hour Law and to keep record of the time, days and hours so spent while posting?

A. I did.

Q. Did he give you such instructions at that time and did you understand them?

A. He did, and I understood them, yes sir.

By the Court:

Q. When was that?

A. I think it was about 1941, somewhere along there.

By Mr. Whitwell:

Q. Now, between that time and 1938, this period just before the war, were there people posting or being employed for these positions or for trainmen's positions?

A. No, I don't think so. I don't have any record of it. If there was it was very few.

Q. Now, when you got those instructions, Mr. Armstrong, did you relay them to the different subordinates who had something to do with receiving applications for posters?

A. I did.

Q. Have those instructions that you received and that you relayed in reference to posters been carried out on the Nashville and P&M Divisions currently, so far as you know?

A. They have.

Q. Do you know at this time or have you known at any time of any person who has posted during the effective period of this Act who was not paid for his period of posting?

A. I don't know of any case. I know there has a lot been paid and I don't know of a single case where we failed to pay for posting.

Q. Do you understand that it is the present practice of the management to pay all persons for their period of posting in accordance with the minimum wage provided by the Fair Labor Standards Act, and also to keep record of the days and hours posted?

A. I do.

Q. Now, you heard Mr. McWhorter testify in reference to adopting the policy of paying $5.00 a day to persons cubbing for positions of firemen, switchmen and brakemen, which policy was adopted, effective December 1st, 1943. Did you get instructions to that effect back at that time?

A. I did.

Q. Did you hear his testimony to the effect that it was adopted as the result of recommendations of a national committee as an inducement or incentive payment?

A. I did.

Q. Have you ever considered that $5.00 a day as wages or is it an incentive payment?

A. We have always considered it as an incentive and not wages.

Q. Since you have been connected with the Railroad and certainly since you have been superintendent of these two divisions has the Company ever considered any person an employee during the period of his posting—I mean of his cubbing?

A. They have not.

Q. Do the people in the office who have charge of receiving these applications, do they have instructions to advise all applicants at the time that they must undergo a training period and certain other routine that has already been explained here before they will be accepted for employment and go on the roster as employees?

A. They have.

Q. Now, are the practices in the cases, as referred to, brakemen, switchmen and firemen, all alike with the exception that the things that a fireman has got to learn are necessarily different from the things that a person has got to learn to become a brakeman?

A. I don't understand that question.

Q. Are these routine requirements such as cubbing, filing an application, taking an examination, physical examination and taking these written examinations, is the practice in reference to brakemen and switchmen practically identical to that of firemen?

A. They are, yes sir.

Q. Now, sometime after December 1st, 1943, did the management of the Railroad change its policy in reference to payment of this $5.00 a day and give instructions that in the future persons would be paid $5.00 a day during the period of their cubbing, provided they completed their cubbing or didn't voluntarily quit before qualifying?

A. That was the instructions, yes sir.

By the Court:

Q. Now, when was that last instruction put into effect?

A. I believe about the 15th of December. I am not sure —somewhere along there.

Q. 1944?

A. 1943.

By Mr. Whitwell:

Q. In other words, the policy that you now speak of followed the other policy about two weeks?

A. That is right.

Q. Now, persons who might have applied for positions in train service between December 1st, 1943, and December 15th, or thereabouts, 1943, would be told by the person handling that that they would be paid $5.00 a day?

A. Naturally they would, yes.

Q. Now, thereafter, beginning about December 15, 1943, were those people, when they made their applications, told at the time that if they didn't complete their cubbing they wouldn't be paid $5.00 a day?

A. That was the instructions that we gave to the ones that were in charge of accepting application. My understanding is that is what was told them. Of course, that was handled by the clerk in the trainmaster's office.

Q. And so far as you know, those people who handled these applications did follow instructions which you gave them?

A. That is right.

By the Court:

Q. Well, have you ever changed that last policy and returned to the policy of paying $5.00 a day regardless of whether they finished or not?

A. We have a later letter.

Q. When was that letter, about?

A. I believe January 1st or 2nd of this year.

By Mr. Whitwell:

Q. Now, Mr. Armstrong, those people who applied during the period prior to those last instructions January 1st, or thereabouts, 1945, and pursuant to the instructions of December 15th, or whatever the date was, and back to December 1st, were their names currently turned in to the accounting department on time slips or time cards or whatever you call them, showing the days of cubbing and the name of the person and the period of cubbing, were those

turned in in all cases except those who were known to have quit cubbing before the list was turned in?

A. I don't believe I understand that question.

Q. What I was really asking you: pursuant to those prior instructions was the accounting department furnished with the names of those who cubbed during that period and the time of their cubbing unless it be some person that you happened to know had already quit cubbing?

A. Time tickets were turned in by the men that were posting and they were turned into the timekeeper or the auditor. They turned that in.

Q. Were those people currently paid for the time turned in?

A. They were.

Q. Now, after the General Manager's office adopted the policy of going back and paying persons who had cubbed, even though they quit, for the days which they cubbed, did you furnish the accounting department a list of those names?

A. We furnished them to the accounting department for both firemen—I mean student firemen and student brakemen.

Q. Do you know whether or not the accounting department has entered those upon its payroll record, or whatever they call it, and issued vouchers for those?

A. My understanding is, it has; I don't know.

Q. Did you hear Mr. McWhorter's statement that he concluded to go back and pay those persons for the cubbing, the days that they cubbed, even though they quit, because it had been brought to his attention that several of them had understood at the time of their applications that they would be paid $5.00 a day regardless?

A. I heard that statement, yes.

Q. Mr. Armstrong, you heard the testimony of Mr. Tucker in reference to the reasons for cubbing, why it was necessary and why it is required and all those things. Do you adopt his explanation in reference to that?

A. I do.

Q. Have you cubbed any men on your divisions longer

than was considered absolutely necessary to teach them the duties of the positions they sought?

A. I have not.

Q. Has this cubbing practice for these positions been absolutely in good faith at all times on the part of the Company?

A. It has.

Cross-Examination,

By Mr. Jansen:

Q. Just one or two questions, Mr. Armstrong. Do I understand that the people who take the applications now have instructions to tell these men that they will get $5.00 a day for cubbing, regardless?

A. Yes, sir.

Q. Will you give me a copy of that letter? I asked you to produce that with a subpoena, didn't I?

A. I don't know whether we have such a letter or not. If we have—

Q. You spoke of a letter on your direct examination. You said you got a letter about this new policy, didn't you?

A. I don't remember.

Q. Well, you did get a letter about it?

A. We either got a letter orally.

Q. Well, which was it? Have you looked for a letter?

A. No.

Q. But you got the subpoena, didn't you?

A. Yes sir.

Q. And it was the subpoena which asked you to bring all written documents in connection with the instructions as to payment for cubbing, didn't it?

A. The letter was addressed to the NC&StL Railway and my understanding was that that applied to the General Manager's office.

Q. Well, the subpoena was addressed to the NC&StL Railway and to you and to Mr. Shannon?

A. I understood that those—

Mr. Jansen: Counsel, do you have those written instructions?

Mr. Hunt: May it please the Court, I think we should clear this up. Now, there was a subpoena duces tecum for three hundred records addressed to the Railway and Mr. Armstrong, and in addition, to bring copy of letters as to these instructions. The General Manager was going to be here and Mr. Armstrong also and we told the General Manager to bring that letter that he wrote to Mr. Armstrong. Now, there is a letter of December 15th that you have there.

The Court: Wait a minute. All we are trying to do now is to get the facts and I want counsel to proceed with the examination on the facts. If there is any question of whether anybody has avoided a subpoena you can bring that to my attention in the usual way and I will handle it but in the meantime we will get on with the facts.

By Mr. Jansen:

Q. Well, do you have any memoranda with regard to these new instructions which you say are now in force? Do you have anything written about that?

A. I don't know. I probably have.

Q. Now, Mr. Armstrong, there are one or two other questions. If a man is an engineer on your railroad running between Nashville and Bruceton, a regular man on the payroll, and he has been making that run for two or three years and you wanted him to run or he wants to run between Nashville and Chattanooga, you require him to cub that Chattanooga part of the railroad before he gets on regular, don't you?

A. I don't understand that. Repeat that, please.

Q. If you have a regular employee, an engineer, who has been running between Nashville and Bruceton and you are going to start him running between Nashville and Chattanooga and he has never run between Nashville and Chattanooga before, you require him to cub Nashville to Chattanooga before he goes on the regular run, don't you?

A. I would think Mr. Tucker would, yes sir. I would think that would be the thing to do.

Q. And he cubs that without compensation, doesn't he?

A. Really I don't know what the contract is. The contract provides for that, with the engineers.

Q. You don't know?

A. That is right.

Q. Suppose a man—what part of the railroad are you superintendent of?

A. Between Nashville and—I will say to Bruceton.

Q. Let's start the other way then. A man has been running between Nashville and Chattanooga and you are going to put him on between Nashville and Bruceton and he has never run between Nashville and Bruceton before—he is one of your employees and all that—you require him to cub between Nashville and Bruceton?

A. Yes sir.

Q. And he cubs without compensation between Nashville and Bruceton, doesn't he?

A. As I say, the contract provides for that and I really don't know. There is a provision in there. I really don't know. I couldn't tell you off-hand.

Q. It is cubbing that he does? He does cub it?

A. I wouldn't think it would be cubbing. He would be familiarizing himself with road he has not been over.

Q. Don't everybody call it cubbing?

A. I wouldn't call a man we had that had to qualify as an engineer on the seniority district as cubbing.

Q. You mean to say you can't tell us whether you pay him or not for cubbing between Nashville and Bruceton?

A. I couldn't until I had the contract.

Q. How long is he required to cub between Nashville and Bruceton after he has been running on the Chattanooga Division?

A. Oh, I would say one trip.

Q. One round trip.

A. I think that would be right. The only thing he would have to do would be to familiarize himself with the new tracks or anything that had been built since the time he was over there. He would be familiar with a lot of the road.

Q. And the same is true of a fireman?

A. No.

Q. You wouldn't ask a fireman to cub?

A. No, that would be only for the engineer.

Q. Because he has got to run the engine and he has to know the division, is that right?

A. And I don't know that we do that.

Q. How about the conductor?

A. We never require that.

Q. Do you have anything to do with—you have charge of the conductors, too, don't you?

A. Yes sir.

Redirect Examination,

By Mr. Whitwell:

Q. Mr. Armstrong, isn't it true that the Nashville Division and the Chattanooga Division are both one seniority district?

A. That is right.

Q. And when a person applies for the position of fireman or brakeman in road service he cubs the Nashville Division and the Chattanooga Division?

A. That is right.

Q. Because it is one seniority district?

A. That is right.

Q. And now if a man has worked for ten years on the Chattanooga Division, after having qualified and become an employee, if the Company requires him to make a run on the other division, over which he has already cubbed and held seniority rights, you think for that run there is some provision in the contract between the organization and the Railway that governs that?

A. That is right.

Q. Then that relationship has nothing on earth to do with cubbing, does it?

A. I don't think so.

Further this witness saith not.

Testimony of William Shannon

The next witness, WILLIAM SHANNON, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. What are your initials?

A. My name is William Shannon.

Q. Where do you live?

A. Nashville.

Q. How old are you?

A. Fifty-eight.

Q. What position do you hold with the NC&StL Railway?

A. Chief clerk in the trainmaster's office of the Nashville and Paducah & Memphis Divisions.

Q. How long have you held that position?

A. Well, I came there January 1st, 1940.

Q. What position did you hold with the Company immediately prior to that?

A. Chief clerk to the superintendent of the Huntsville Division.

Q. Mr. Shannon, as chief clerk to the trainmaster of the Nashville and P&M Divisions, do you have anything to do in connection with persons making application for positions of firemen or brakemen?

A. I do with brakemen.

Q. Now, are the applications for positions as firemen handled through the master mechanic's office?

A. I understand they are.

Q. And you say you have been more or less in charge of that since January, 1940?

A. I think so, yes sir.

Q. Now, prior to December 1st, 1943, when a person came to your office and made application for position of brakeman was he told by you at the time that he would have to undergo a physical examination and a cubbing period?

A. Yes sir.

Q. Was he also told that he would have to stand a written and an oral examination before he could qualify for the position applied for?

A. That is right.

Q. Now, prior to December 1st, 1943, was he told at the time that he would not be paid anything during the period of his cubbing?

A. Yes sir, he was.

Q. Now, those general things that you have spoken of, are they true since December 1st, 1943, with the exception of the change in policy as to compensation?

A. That is the only change.

Q. Now, about December 1st or the latter part of November, 1943, were you instructed by the superintendent, Mr. Armstrong, that the Company would pay persons while cubbing $5.00 a day?

A. Yes sir.

Q. And was that policy modified or changed in some way along about the middle of December, 1943?

A. Yes sir.

Q. Now, between the date of December 1st, 1943, and the middle of December persons who may have applied for those positions, were they told then that they would be paid $5.00 a day?

A. They were told that they would be paid $5.00 a day.

Q. Now, I believe it appears that Mr. J. B. Allen testified yesterday that he cubbed between those dates.

A. I think so. He did, yes sir.

Q. If he did, he was told, as he says, that he would be paid $5.00 a day?

A. That is right.

Q. Now, about the middle of December, 1943, what instructions did you get from the superintendent in reference to persons who applied and began their cubbing period and quit before completing it?

A. We were instructed they wouldn't be. They would be paid $5.00 a day, provided they completed their training.

Q. But if they didn't complete their training they wouldn't be paid, is that right?

A. They wouldn't be paid unless they cubbed through a regular pay day and got paid. We didn't hold back anything to see if they were going to complete it.

Q. In other words, if I understand you, if a man cubbed

through a regular pay day, why, he would be paid, even though he had quit and you didn't know about it?

A. That is right.

Q. But if you knew about it he wouldn't be paid?

A. We would stop it, yes sir.

Q. Now, during that period were those things told to the persons who made applications and told at the time?

A. Yes sir.

Q. Now, beginning about January, 1945, did you get instructions from Superintendent Armstrong that persons who cubbed for positions of brakemen would be paid $5.00 a day?

A. Yes sir.

Q. In other words, that instruction was identical with the very first instruction, wasn't it?

A. Yes sir.

Q. And since that time have persons who made application been told that they would be paid $5.00 a day?

A. Would be paid $5.00 a day.

By the Court:

Q. Now then, how long did this policy remain in effect insofar as paying them for the posting or not paying them if they quit during that period?

A. Well, that would be from about December 15th, 1943, until about January 1st, 1944.

Q. 1944 or 1945?

A. 1945.

Q. A little more than a year?

A. Yes sir, a little more than a year.

The Court: All right.

By Mr. Whitwell:

Q. Now, Mr. Shannon, is it your understanding that the same instructions went out in reference to persons applying for positions of firemen and switchmen?

A. I understand it was the same.

Q. And switchmen?

A. Yes sir.

Q. Now, after this policy was changed in January, 1945, and made the same as it was in December, 1943, or Decem-

ber 1st, 1943, did the superintendent's office furnish to the accounting department a list of the names of persons who had cubbed but who were known to have quit their cubbing before they completed it or before they finished their examination and qualified, and give along to the accounting department with the name of that person the period of his cubbing?

A. I understand they did, furnished by the superintendent's office.

Q. You understand that there will be witnesses here?

A. I do.

Q. So far as you know, have those names all been turned in who had not been covered or already paid under prior instructions?

A. So far as I know.

Q. And you understand that they are to be paid if vouchers are not already issued?

A. That is right. In most cases they have already been issued.

Q. Now, Mr. Shannon, you have heard the testimony of Mr. Tucker and Mr. Armstrong in reference to the necessity of a person undergoing a training period or cubbing and these different preliminary or re-employment conditions, and to shorten this testimony, do you adopt Mr. Tucker's statement in reference to that?

A. I do.

Q. I do want to ask you two or three questions about this so-called schedule that is handed a man who has filed application and taken his physical and is ready to begin cubbing. I believe such cub is handed a schedule of trips, whether he be cubbing for the position of brakeman or fireman; is that your understanding?

A. That is my understanding, he is. A brakeman is. If he is cubbing for brakeman he is.

Q. You know a brakeman is. Does that statement read, just above the list of schedules suggested to him, this: "It is desired that you cub—"

Mr. Jansen: Just a minute. I think the schedule is the best evidence and I object.

The Court: There is one of them already in evidence. I looked at it yesterday.

Mr. Whitwell: I overlooked that and I shouldn't have asked this question. There is that statement. I believe that is the way it is.

Q. Now, Mr. Shannon, tell us briefly why it is desired that a person cubbing be given a schedule to follow.

A. Well, first, it is for his convenience in getting with the proper crew and to know where and when to find that crew. It is not considered that they have time to look after more than one and it is hazardous for them to do so. For that reason we separate them. And another reason that I have had in mind is, I have had occasion to use that to keep up with where the cub is, in case he has sickness at home and his people call and want us to notify him. Well, if I don't know what crew he is with, he is practically lost.

Q. Well, also, I will ask you if it is not true that that schedule set out is arranged as to make it possible or to make it certain that he will familiarize himself with all parts of the line over which he will be required to work after he becomes an employee?

A. It is.

Q. Now, is he required to literally follow that schedule or may he cut some runs out and still ride some and miss some?

A. He can miss them.

Q. Does that frequently happen?

A. I will say that generally happens that he will miss some during the period.

Q. If he does not follow that schedule and maybe cubs one day and lays off four, is he still permitted to go ahead and cub, if he wants to?

A. He is.

Q. Mr. Shannon, were you in the courtroom yesterday when a man by the name of R. T. Justice testified?

A. I was.

Q. Did you hear him say he had cubbed sixteen days and took a physical, making seventeen days, and had been paid only $30.00?

A. Yes sir, that is my recollection of his statement.

Q. Did you hear him say that he was promised $5.00 for the day that he took his physical examination and that the Company wouldn't pay him?

A. I understood him to say that he had not been paid.

Q. Do you have a cancelled check made payable to him covering that day?

Mr. Jansen: If the Court please, that wasn't the testimony of Mr. Justice. He testified that he had not been paid for the dead-heading and the Martin turn-around, and I object to counsel misstating the testimony.

Mr. Whitwell: Mr. Justice said he got—

The Court: Proceed. I heard the testimony and you need not argue about that. Go ahead. What is it you want to say about it?

By Mr. Whitwell:

Q. You have with you check showing payment of the base sum of $5.00 to Mr. Justice, R. T. Justice, dated June 15, 1944?

A. I do.

Q. Now, do you have another check here showing payment of $35.00 to Mr. Justice, voucher dated July 11th, 1944? That is for $35.00 minus deductions.

A. I do.

Q. Now, Mr. Shannon, I hand you the record of Mr. Justice here and want to ask you just a few questions about it.

By the Court:

Q. What do these checks aggregate there?

A. $5.00 and $35.00.

Q. $40.00?

A. $40.00.

By Mr. Whitwell:

Q. Now, Mr. Justice claimed that he cubbed sixteen days. I wish you would refer to that record and tell us what days he did cub.

A. The number of days?

Q. The number of days that he cubbed.

A. He cubbed thirteen days that would come under the agreement with us to pay him $5.00 for.

Q. I want to ask you about these other three days. Did he turn in a time ticket for June 20th, 1944?

A. Yes sir, he did.

Q. What was he doing that day? What does the time ticket show?

A. He showed he was dead-heading from Nashville to Bruceton.

Q. Dead-heading. Have you ever considered dead-heading cubbing?

A. No sir.

Q. Is that the reason that he wasn't paid for June 20th, he was dead-heading and not cubbing?

A. That is right.

Q. Now, what did he turn in in reference to June 21st, 1944?

A. He turned in two days on June 21st. He turned in two days. Do you want to know what they were for?

Q. Yes sir, tell us what they were for.

A. One was trip Bruceton to Martin and return, on freight train, and the other one was trip from Bruceton to Nashville made later the same day.

Q. In other words, he made two trips in one day and turned in two days' cubbing for one day's cubbing, is that right?

A. That is right.

Q. Is that the reason you didn't pay him $10.00 for that day instead of $5.00?

A. I didn't have any instructions to pay him for but one $5.00.

Q. This $5.00 incentive payment you speak of, it was not a payment of $5.00 a trip, it was $5.00 a day while cubbing, wasn't it?

A. A calendar day.

Q. Now, what is the situation as to June 23rd, 1944?

A. June 23rd he turned in two days.

Q. Is that the same situation as existed with reference to June 21st?

A. Yes sir.

Q. So he actually cubbed thirteen days and not sixteen, is that right?

A. That is right.

Q. He has actually been paid $40.00 and not $30.00?

A. That is right.

Q. And did he ever qualify by completing his cubbing and taking his examinations, oral and written?

A. No sir.

Q. Was he notified, as shown by that file, that he would have to complete his examination?

A. I notified him, as shown by the file there, that he hadn't completed it.

Q. And did he ever complete it?

A. No sir.

Q. So there are, according to the record, six days for which he has not been paid for cubbing unless paid recently?

A. That is right.

Q. And that $30.00 wasn't paid at the time because he had not completed his cubbing?

A. He didn't complete his training.

Q. Now, under this January, 1945 policy has his name gone on the roll of those who are to be paid regardless of whether they finished or not?

A. It has.

Q. Have you had occasion to look at the record and see whether or not a voucher has been issued to him for $30.00?

A. I have.

By the Court:

Q. Well, has it?

A. It has.

The Court: I think that about winds that up, don't it?

Mr. Whitwell: Yes sir. Now, I want to ask just a few questions as to Mr. Bugg.

The Court: Before you do that we will take a ten minutes recess.

(Recess).

By Mr. Whitwell:

Q. Mr. Shannon, I just wanted to ask you two or three questions about Mr. E. W. Bugg, who testified yesterday. How many days, according to the record, did Mr. Bugg cub?

A. This file shows that he cubbed a total of ten days, it seems.

Q. Now, was there any objection to that one day that covered the physical examination?

A. There was not.

Q. Was part of that cubbing the latter part of June, three days in June, and one day for the physical—was voucher issued? I am talking about September 27th. Was that the date of his physical?

A. The date of his physical—let's see—I think it was—I think that was the first day he cubbed. The date of his physical was September 22nd (Referring to file). September 27th was the first day he cubbed.

Q. Now, was he paid, the first voucher for $20.00, for four days in September, 1944?

A. Yes, sir.

Q. Now, the balance of his cubbing was the early part of October, 1944, which would be on another payroll date?

A. Another payroll.

Q. And he got $20.00 for his cubbing during the September period?

A. Yes, sir.

Q. Now, was a check in the amount of $35.00 issued to him covering his cubbing in the October period?

A. I understand it was, yes sir.

Q. Issued at that time?

A. At that time.

Q. And under the practice that if a man didn't complete his cubbing he wouldn't be paid, it is your understanding that that check was not delivered to him?

A. That is right.

Q. It is also your understanding that under the policy adopted this year, the early part of the year, that those people who cubbed and quit and had not been paid for the days cubbed, that voucher is being issued or has been issued to cover that entire period?

A. That is right.

Q. Making payment of $35.00, plus the first voucher for $20.00, or a total of $55.00?

A. That is right.

Q. Now, does that same situation obtain with reference to Mr. Allen, J. B. Allen?

A. Yes, sir.

Q. He didn't complete his cubbing and at the time he didn't receive pay for cubbing?

A. That is right.

Q. But he is included in this pick-up list that we have been talking about?

A. Yes sir.

Cross Examination,

By Mr. Jansen:

Q. For whom are you chief clerk?

A. The trainmaster of the Nashville Division and the Paducah & Memphis Division.

Q. Now, these instructions that you received around January 1st of this year with regard to paying everybody, whether they completed their cubbing or not, were they in writing?

A. Well, I don't know whether they were in writing or not. The office is right adjoining the superintendent's office.

Q. Well, tell me this, Mr. Shannon: most all instructions on the Railroad with regard to things of that kind, instructions with regard to hiring and firing and all of that, are generally in writing, aren't they?

A. Well, we don't get many instructions in regard to hiring and firing. That wouldn't apply to me.

Q. Well, memoranda that relate to different things that you might have to do in connection with the operations of your particular office are generally received in writing, aren't they?

A. Well, they may be confirmed in writing but instructions, as they come out, I usually get them—I get them verbally.

Q. And you also get written instructions?

A. Yes sir.

Q. Now, you don't recall whether you got written in-

structions about any of this paying business in connection with cubs at all, is that right?

A. Well, I think I got the first letter probably in writing.

Q. That is the one dated in December, 1943?

A. Yes sir.

Q. But all the subsequent things you don't recall getting?

A. I wouldn't say about that.

Q. How long does it take to get instructions from Nashville to Chattanooga?

A. To get instructions?

Q. Yes sir. Do you know anything about that? When they have instructions for the Chattanooga Division do they send them from Nashville to Chattanooga?

A. I presume they do. That would go through some other department.

Q. And is that generally in writing—do you know?

A. I wouldn't know.

Q. Did you have some discussion with Mr. Justice about not getting his cubbing pay for the dead-heading and the Martin turn-around?

A. He testified yesterday that I did. We have had so many cubs that I wouldn't say just what was said but I remember some discussion about it.

Q. Now, whether he received $30.00 or $40.00, his complaint was that he had not been paid for the dead-heading and that Martin turn-around, that is right?

A. That is right.

Q. And the dead-heading, was that on a day when he had had another run?

A. No sir. This is not the file.

Q. Will you refer to that for me, please? (Handing file to the witness).

(Witness hands a ticket to counsel)

Q. What is there on this ticket that indicates it was dead-heading, the d. h.?

A. Yes sir.

Q. And he dead-headed from where?

A. From Nashville to Bruceton.

Q. Do you have any idea why he dead-headed?

A. He went with the crew, I presume.

Q. With the crew?

A. Yes sir.

Q. Now, what does dead-heading mean?

A. It just means more than likely their caboose is attached to another freight train and they just rode down there.

Q. Do you know how long it would take to travel from Nashville to Bruceton dead-heading?

A. Do you want it in this case?

Q. Yes sir.

A. Four hours and forty-five minutes.

Q. Now, this Martin turn-around, turn to that, will you, please?

(Witness looks for record.)

A. You see, the day he made the Martin turn-around, we might have paid him for that day and didn't pay him for the other one.

Q. You mean you might have paid him for the Martin turn-around and not paid him for the local?

A. It wasn't a local. It was a through freight.

Q. Now, that is the only date, June 21st, and that shows Bruceton to Martin, does it?

A. Bruceton to Martin and Martin to Bruceton.

Q. Now, how far is it from Bruceton to Martin?

A. Why, it is in the neighborhood of thirty-seven miles.

Q. Can you tell us in this case how long it took him to make the Martin turn-around?

A. Eight hours and forty minutes.

By the Court:

Q. Now, did he make some other run on the 21st?

A. He made a trip from Bruceton to Nashville.

Q. From Bruceton to Nashville?

A. He started on that, yes sir.

Q. And that was on the 21st?

A. Yes sir.

Q. What do you mean, starting on it?

A. The date of the ticket.

Q. How long did it take him?

A. Five hours and twenty-five minutes.

By Mr. Jansen:

Q. Do you know what train he was on?

A. Train 3/57.

Q. What kind of train is that?

A. Well, I wouldn't know that without looking at the train sheet. Now, it might have been a dead freight or it might have been a perishable freight.

Q. In any event, he made two separate trips?

A. No.

Q. It took some eight hours and on another one it took five hours on that same 21st, didn't it?

A. Yes sir.

Q. You heard his testimony that he claimed that he should have been paid for the Martin turn-around and the dead-heading?

A. Yes.

Q. And you don't recollect any conversation with him at all?

A. I recollect the conversation but I don't recollect what was said.

Q. Now, this schedule that you make out in the case of one employee that we had here yesterday, or one of these cubs, when he didn't finish his schedule you gave him a new schedule to start a certain day?

A. Yes sir.

Q. Is that what you do whenever they miss one of their schedules?

A. Well, if they don't get enough cubbing. Now, when they miss part of the schedule they are supposed, if they go back to cubbing, to go back on the proper date—in other words, not get off on some other train.

Q. Supposed to follow the schedule?

A. Supposed to follow the schedule as far as they do go.

Q. Well, if they miss one or two days that means they won't have enough cubbing and you have to send them back and generally they want to go back?

A. Generally you will add a little bit to the schedule at the end in order to make it for what they miss.

Q. And that schedule is designed so that they cover each branch or each run of the road?

A. That is our intention.

Q. It is also designed so that they cover the work, that is, the runs, the locals?

A. Yes sir.

Q. As much as possible.

A. And especially at first—

Q. And the locals?

A. The locals is what we use primarily.

Q. You don't know anything about the firemen, I take it?

A. No.

Q. That is under the supervision of the master mechanic?

A. I understand it is, yes sir.

Q. And with reference to most of the cubs, brakeman jobs, you give them the same general schedule but it may vary as to trains?

A. Approximately the same, yes sir.

Q. You make out the schedule generally the same for each one?

A. Yes sir.

Q. Do you have anything to do with making the details of the income tax withholding return?

A. No, that is made by the accounting department.

Q. You don't know when this Exhibit 6 was made out?

A. No sir.

Q. You do know that Mr. Bugg didn't get the $35.00?

A. I know that he didn't get the $35.00, yes sir.

Q. And all he got was $20.00?

A. And that he can get the $35.00.

Redirect Examination,

By Mr. Whitwell:

Q. Just two or three questions. Mr. Shannon, with reference to Mr. Justice, about whom you have been questioned, the day that he took his physical examination and for which he was paid $5.00, did he do anything that day except take the physical?

A. No sir, not toward his training.

Q. Now, turn to the first day he worked and tell me how many hours he worked that first day, I mean that he cubbed.

A. Seven hours and twenty minutes.

Q. Now, how many hours did he cub the second day that he cubbed?

A. Six hours and thirty minutes.

By Mr. Jansen:

Q. Where are you getting the time there, those hours there?

A. The time is shown in here, you see.

Q. You start at the bottom, do you?

A. Well, if he completed it like he was told to he would put the time he went on duty and the time off duty. That was what he was instructed to do. He didn't always do that. I put that one in, I believe, from the conductor's ticket. You see, I could take the conductor's ticket and get the same information.

Q. Most of them don't show the number of hours?

A. They all do now.

Q. I mean most of Mr. Justice's?

A. Most of his doesn't. They should have but he just overlooked put it in there.

Q. Will you file that record of Mr. Justice as Exhibit No. 1 to your testimony?

A. Yes sir.

(Papers so filed and marked Defendant's Ex. No. 1—Justice.)

Mr. Whitwell: Under the conditions applicable to the exhibits filed yesterday.

Further this witness saith not.

The next witness, GRADY ADCOCK, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. What position do you hold with the NC&StL Railway?

A. Traveling engineer.

Q. How long have you been traveling engineer?

A. Approximately a year.

Q. As traveling engineer do you have jurisdiction over or supervision over and observe both engineers and firemen?

A. Yes sir.

Q. Now, just briefly without any detail tell the Court generally the duties of a traveling engineer.

A. Well, I o. k. cub firemen, ride with engineers and write up defects on locomotives.

Q. Do you as traveling engineer go along with engineers and firemen and observe their work and make suggestions?

A. That is right.

Q. And check on them and see that they understand their work, and also o. k. cubs who are cubbing for position of fireman?

A. Yes sir.

Q. Now, prior to the time that you became traveling engineer were you an engineer, locomotive engineer?

A. Yes sir.

Q. How long have you been a locomotive engineer?

A. Since I was promoted in 1942.

Q. Now, before you were promoted to engineer in 1942 what job did you have with the Railroad?

A. Firing.

Q. How long were you a regular fireman for the NC&StL Railway?

A. Well, let's see. I came back to work in 1938 and I got a regular job right away after that. I don't know just for how many months but it wasn't but just a few months until I had a regular job.

Q. Now, as fireman have you had persons on your engine from time to time who were cubbing for the position of fireman?

A. Yes sir.

Q. Incidentally, before you became a fireman did you undergo a training or cubbing period?

A. Yes sir.

Q. Were you paid anything during that cubbing period?

A. No sir.

Q. Did you fully understand that you were cubbing for your own benefit and without compensation?

A. That is right.

Q. Now, persons who cubbed with you while you were a fireman, did they have different things that it was necessary for them to know in order to qualify for that position?

A. Yes sir.

Q. Would you undertake to teach them those things?

A. I did that, yes sir.

Q. Did you also do the different jobs that a fireman has to do and have them watch you do those jobs so that they might learn them themselves?

A. Yes sir, the first trip I would let them just observe and talk to them.

Q. Then you would show them?

A. That is right.

Q. And then you would let them do some of the manual activities of the regular fireman?

A. Yes sir, I would let them take it then and I would watch them and talk to them and stand by them.

Q. Now, Mr. Adcock, tell us, more for the record than anything else, some of the duties of a fireman that a cub has to acquaint himself with in order to qualify.

A. Well, he has got to understand the operation of the stoker and on our road we have three different types of stokers, and he has got to familiarize himself with all of them and the hand-fired engines, and all of them have different jets to do the same job but there is some difference in setting the jets.

Q. Well, is there a difference in the hand-fired engines and stoker-fired engines, differences that must be learned by cubs?

A. Yes sir.

Q. Does he have anything to do with the water gauges to keep the proper steam?

A. That is right, know how to carry the water, regulate the feed water pump. He has to know the grades and things like that to be a fireman.

Q. Does he have to learn the road and the different stations, switches and fixed signals along the road?

A. Yes sir.

Q. Does he have to learn the train signals?

A. Yes sir, he picks that up along as he goes. He don't

know it all to begin with, neither does he about firing, but he learns all along.

Q. Now, from your experience and your observation is it necessary that a person undergo this actual training period in order to learn the duties of a fireman?

A. Yes sir.

Q. Now, you have had people cub with you on an engine and I wish you would tell the Court whether or not such things as that person may do in connection with his cubbing, are they of any benefit to the Company during that cubbing period?

A. No sir.

Q. Well, learning to fire a locomotive, is that actually an expense to the Company?

A. Yes sir, I think so.

Q. Does he have any duty or any responsibility in connection with that railroad operation?

A. No sir.

Q. That rests with the regular crew?

A. That is right.

Q. Now, in your experience with persons who cub for position of fireman with you are they required to cub any particular schedule or make any particular trip or do they more or less go at their convenience?

A. Back when I was firing they didn't have any schedule for them. They just would go whenever they wanted to and they still do but I think they kinder have a form they go by now, a schedule.

Q. But you travel up and down the line all the time as traveling engineer, a big part of the time?

A. That is right.

Q. Do you know as a fact that they do more or less select their trips and go at will?

A. Yes sir.

Q. Do you know of occasions when persons would ride a train as a cub for position of fireman and make part of a trip and then hitch-hike back?

A. I have had that to happen, yes sir.

Q. You have had that to actually happen with you?

A. That is right.

Q. You have a certain person in mind, do you?

A. Yes sir, a mighty good fireman now.

Q. And he went ahead—after leaving the train and hitch-hiking back did he come on back later on and complete his cubbing, and you say he made a good fireman?

A. Yes sir.

Q. Mr. Adcock, out of your experience both as fireman under whom persons trained and your experience as an engineer and traveling engineer do you know of any case when you considered that the Railroad Company permitted or insisted upon anybody cubbing too long?

A. No sir.

Q. Now, you go up and down the road every few days. One or two witnesses yesterday emphasized what a cub brakeman does at local stations by way of loading and unloading l. c. l. freight. I want to ask you from your observation and actual knowledge if it is not a fact that there is hardly any l. c. l. freight by rail on any part of the line at this time?

A. Not very much.

Q. And hasn't that been true for seven or eight years, and certainly since highway transportation has made considerable inroads?

A. Yes sir.

Q. Now, at such places as Dickson or Waverly where there is, of course, more l. c. l. freight than at other stations, I will ask you if it is not true that as to those places, or most of them, there is a regular set-out car handling l. c. l. freight?

A. That is right.

Q. Now, as to such places where there is considerable l. c. l. freight, other than at the smaller stations, does the Railroad have regular station employees there who must assist in the loading and unloading of l. c. l. freight?

A. Yes sir, they have station men there at most of the places of any size, you might say, like Dickson and Waverly.

Q. Do you consider that anything that a person does while he is cubbing for the position of fireman speeds up the movement?

A. No sir.

Q. Is there anything that a cub does for the position of

fireman that the regular fireman is not there to do and paid to do?

A. No sir.

Q. Is or not the same thing true as to a person cubbing for the position of brakeman?

A. I am not in as good position to know but I would say so; I would say yes.

Q. Now, Mr. Adcock, I wanted to ask you one question —counsel for plaintiff asked Mr. Armstrong something about a person who has completed his cubbing, say, on the Nashville and the Chattanooga Divisions and who, for a long period of time, we will say, is confined to the operations on the Chattanooga Division, during which time, of course, he holds seniority on both divisions. Now, when he has operated on the Chattanooga Division exclusively for a long period of time and desires to work or is transferred to the Nashville Division, we will say, just what are the circumstances under which he is transferred? There is something about making a trip. I don't understand it. Can you explain that?

A. Well, if he is not familiar with the line of road we furnish a traveling engineer to go along and accompany him on the trip until he is qualified and o. kayed by him that he is familiar enough with the division to handle the job. Is that what you wanted to know?

Q. I wanted to ask you this: if it is not a fact that during that time that he is making that run or runs, whether it is one or three, the Company furnishes a traveling fireman or traveling engineer to go along with him?

A. Yes sir.

Q. Now, during that time is the traveling engineer paid?

A. The traveling engineer is paid a salary.

Q. And during that time is that man paid the regular contractual rate?

A. That is right, just the same.

Q. It has been called to my attention that what you have said is in reference to an engineer?

A. Yes sir, an engineer.

Q. Now, if a fireman is transferred he draws the regular contractual rate, doesn't he?

A. Yes sir.

Cross Examination,

By Mr. Jansen:

Q. You mean to say, Mr. Adcock, that neither an engineer nor a fireman when transferring doesn't have to cub at all in between the time that he goes on the second division?

A. No sir, he doesn't cub any.

Q. Have you ever heard of that in your experience with the Railroad?

A. I don't think I have.

Q. If I should produce an engineer who testified that he had to make a round trip run on the new division and didn't get paid for it would you say that that is not the practice of the Railroad?

A: Well, that is not the practice now.

Q. Do you know that that had been the practice?

A. Well, that has not been the practice for quite a while, for several years.

Q. Well, when did the practice change? You have been with them only since 1942 as traveling engineer, haven't you?

A. No, 1943.

Q. Oh, 1943. So all you know about it, so far as the Company is concerned, is during the time that you were with them as traveling engineer. That is it, isn't it? Is that right?

A. I couldn't say that. I wouldn't say that.

Q. Well, do you know anything about the prior practice of the Company with regard to cubbing engineers when they move from one division to another? You know, as a matter of fact, Mr. Adcock, that it has in the past been the practice of the Company at one time or another to require an engineer to cub, run without pay, when he is transferred from one place to another, don't you?

A. We will say, I won't take any further than I have been traveling engineer. Will that be all right?

Q. I am asking you if you know of your own knowledge, as a matter of fact, that that was the practice of the Company?

A. No, I don't know.

Q. You don't know?

A. No sir.

Q. All you know is what has been the practice since the time you started being traveling engineer, is that right? Is that all you care to testify about?

A. Yes.

Q. How long did you cub?

A. I cubbed—I don't have any record of it.

Q. Oh, approximately?

A. Well, something like a couple of trips each way, a couple of trips to Chattanooga and a couple to Bruceton.

Q. What railroad had you been working for before?

A. Prior to that I never had worked—I worked for the Terminals awhile.

Q. What kind of work?

A. Firing.

Q. Oh, you were a fireman before. When you originally cubbed for fireman how long did you cub?

A. Oh, I didn't cub but about a couple of days, I think.

Q. Do you know? How many days was it?

A. Two.

Q. You were firing for the Terminal first, before you went on the road, is that right?

A. Well, I fired for them something like a month.

Q. At the Terminals?

A. Yes sir.

Q. And then when you went on the road you had to cub for two or three days without pay, is that right?

A. No, I had to cub—well, I said two trips each way. Well, just approximately that.

Q. Without pay?

A. Yes sir, without pay.

Q. And that was after you were working for the Company at the terminal?

A. I didn't get so much experience in the Terminals. They carried me from there to the army in the First World War.

Q. But you did cub after you had worked as a fireman before, is that right?

A. Yes, I cubbed after.

Q. Now, part of your job as traveling engineer is to o. k. cub firemen, isn't it?

A. Yes sir.

Q. And when do you travel with them and o. k. them?

A. Well, when they think they are ready for an o. k. they call for me.

Q. Is that after they have completed the schedule that the Company furnishes?

A. Yes sir.

Q. In most cases they have completed the schedule that the Company furnished before you get in contact with them?

A. That is right.

Q. And you don't know what the Company did about schedules and all of that before you were traveling engineer, do you?

A. Well, I don't think they had any.

Q. You don't think they had any—do you know?

A. They didn't have any back in those days.

Q. Well, did the engineer have to sign any kind of paper for the cub to show that he was or had spent the time with him?

A. I don't know just what year they started that, but I believe it was 1943 when they started paying them and started allowing a cub to sign the trip card.

Q. You really don't know very much about that, do you, Mr. Adcock?

The Court: Well, that sort of proof—I think I can determine that myself.

By Mr. Jansen:

Q. You don't know what kind of schedules they furnished firemen before the year 1943, do you?

A. Well, they just had so many trips, let them cub so many trips on each train.

Q. They did have some sort of schedule that they would cub, so many trips on each train before 1943?

A. On each run, I imagine.

Q. In fact, that has always been the practice of the Company, hasn't it?

A. No, back prior to that they just cubbed just anywhere they would take a notion.

Q. Now, what do you mean when you say the Company doesn't get any benefit from what a cub does?

A. Well, because they have a regular man there to perform this job.

Q. Is that the reason why you think the Company doesn't get any benefit?

A. Yes sir, that is a reason.

Q. The cub does do the fireman's work while the other fireman is watching him?

A. Yes sir.

Q. So the only reason you say the Company doesn't get any benefit is because there is a regular man, as counsel suggested, there who is paid to do the job?

A. Yes sir.

Q. But the fireman himself—the cub might do it and the other man watch; in fact, that is the practice, isn't it?

A. Yes sir, he watches him and instructs him.

Redirect Examination,

By Mr. Whitwell:

Q. This cubbing that you did for position as switchman, that was cubbing in the switching operations and not road cubbing?

A. Yes sir.

Q. Now, when did you do such road cubbing as you did, about when was that?

A. 1922.

Q. Have locomotives been changed, the style been changed since then?

A. Yes sir, a lot. All our engines have been stokered.

Q. And railroad operations more complex?

A. Bought new power.

Q. And railroad operations more complex now than then?

A. Yes sir.

Recross-Examination,

By Mr. Jansen:

Q. I think I misunderstood you. You mean you had worked three or four years for the Terminals?

A. No, just about a month, I think it was.

Q. You mean in 1922?

A. No, I worked back before the first World War. I went from there to the army. When was it over? What year was it over?

Q. 1918.

A. Well, that is the year then I left here.

Q. I still don't understand. You started with the NC&StL Railway in 1938?

A. No, I started in 1922, my first time and then I was cut off about ten years, I guess.

Q. What did you do during those ten years?

A. Farmed.

Q. Then when you came back you started again in 1938?

A. Yes sir.

Q. Now, the first time you were working for the NC&StL were you on road work?

A. Yes sir.

Q. And when you came back in 1938 did you cub again?

A. No.

Q. Not at all?

A. No sir.

Q. Did you come back as traveling engineer or how?

A. Fireman.

Q. Where did you run?

A. I was running over the Nashville and Chattanooga Divisions where I held seniority, both extra.

Further this witness saith not.

The Court: How far, Counsel, are you from the end of your testimony?

Mr. Whitwell: I feel quite sure we are going to get through this afternoon. I have an accounting witness and then I have several, of course, here on cubbing practices and things like that.

The Court: I think you gentlemen have got the picture as to the general practice of cubbing and posting painted with admirably clarity already.

Mr. Whitwell: I won't insist on pursuing it any further, then.

The Court: Judge Davies is going to want this courtroom for criminal trials Monday. I am not shortening at all anybody's opportunity to put their evidence in. I don't want anybody to feel that he hasn't had full opportunity to put in everything he wants to. As I stated a day or two ago, there is no use to keep on going over things that we all know about.

Mr. Whitwell: I was just going to suggest, if it would require a couple more hours in the morning I would be very glad to come in the morning.

The Court: We will recess at this time until 2:00 o'clock.

(Recess for lunch.)

Afternoon Session.

J. B. FAULKNER, the next witness, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Mr. Faulkner, give your name to the reporter, please sir.

A. J. B. Faulkner.

Q. Where do you live, Mr. Faulkner?

A. Mt. Juliet, Tennessee.

Q. How old are you?

A. Sixty-nine.

Q. Are you employed by the NC&StL Railway?

A. Yes sir.

Q. In what department?

A. Accounting department.

Q. What is your position in the accounting department?

A. Assistant to the Auditor of Disbursement.

Q. How long have you held that position?

A. Fifteen years, approximately.

Q. Now, as assistant to the Auditor of Disbursements are you familiar with the records of the company in that office?

A. Yes sir.

Q. Are those records kept in the regular course of business?

A. Yes sir.

Q. Are they kept according to the rules of the Interstate Commerce Commission?

A. Yes sir.

Q. Are they inspected by persons connected with the Commission?

A. Yes sir.

Q. Now, Mr. Faulkner, I will ask you if you have received from the Superintendent, Mr. Tucker, a list of all persons who have posted for positions of porter, messenger, caller, stenographer and clerks at Chattanooga?

A. Yes sir.

Q. Did that list show the names of the persons and the year and month and the time spent in posting?

A. Yes sir.

Q. Were you instructed by Mr. Tucker's office to take that list of names and enter them upon the payroll records in your office?

A. Yes sir.

Q. And to apply the applicable rate provided in the Fair Labor Standards Act to the periods of posting that were submitted to you in this report from Mr. Tucker?

A. Yes sir.

Q. Were they entered upon the payroll records of your company?

A. Yes sir.

Q. And was the rate that you have spoken of applied to each of those persons and the total amount that those rates figured applied?

A. Yes sir.

Q. Have vouchers issued from your office for the amounts shown covering the periods of posting and the Wage and Hour rate applied to those periods?

A. Yes sir.

Q. Now, from those records did you furnish such a list several days ago that I have here of the names of the persons posting at Chattanooga and the dates of their posting and the amounts of those vouchers that have been issued?

A. Yes sir.

Q. And I believe you say vouchers have issued to all of those persons?

A. Yes sir.

Q. Now, Mr. Faulkner, Mr. S. T. Porter, witness for the plaintiff, testified here yesterday and he filed as exhibit a list of names at Chattanooga or persons who had posted going back, I believe, to 1940. Have you seen a copy of that list of names which was filed by Mr. Porter?

A. I have.

Q. Do you have a copy with you?

A. I have a copy.

Mr. Whitwell: Is there any question that is the copy that you furnished yesterday?

Mr. Jansen: No, no, of course not.

By Mr. Whitwell:

Q. Now, Mr. Faulkner, how many names appear upon the list which Mr. Porter submitted as an exhibit?

A. Eighty-two.

Q. Now, have you taken that list of Mr. Porter's and checked it against the list which you furnished me or my office several days ago to determine how they compare as to the number of names?

A. I have.

Q. How many names of posters at Chattanooga appear upon the list which you prepared from your records several days ago?

A. Eighty.

Q. Now, did you find any names on Mr. Porter's list that do not appear on your list?

A. Yes sir.

Q. How many?

A. Four.

Q. Did you find any names on your list that don't appear on Mr. Porter's list?

A. Yes sir.

Q. But you say there is a difference of only two in number?

A. Yes sir.

Q. Now, I would like for you to file as an exhibit to your testimony the list that you compiled from your records.

A. I will.

(List so filed and marked Ex. No. 2 Defendant Faulkner.)

Q. Mr. Faulkner, have you, as to cubs, prepared a list of all persons who have cubbed on the NC&StL Railway system, as shown upon the payrolls and records of your office since December 1st, 1943?

A. Yes sir.

Q. Have you broken that down by divisions of the Railway?

A. Yes sir.

Q. What is the total number of persons who have cubbed on the NC&StL Railway since December 1st, 1943?

A. Four hundred and seventy five.

Q. Of that total number how many were paid currently, that is, at some payroll date during or immediately following their period of posting?

A. Four hundred and six.

Q. And that leaves how many who were not currently paid?

A. Sixty-nine.

Q. Now, sometime during this year or certainly recently have you received from the various superintendents lists of names of persons who were not paid currently with instructions to enter them upon the payroll and issue vouchers?

A. Yes sir.

Q. Is that the sixty-nine you had reference to?

A. Yes sir.

Q. Have vouchers been issued to those persons or in the process of issuance at this time?

A. They have been issued.

Q. Currently do you receive at your office either from the superintendents or from the person cubbing himself what we call time sheets or time lists showing the period, the days posted?

A. Yes sir.

Q. And are those names, as they come in now, as they exist, appearing on your payroll sheets?

A. Yes sir.

Q. Do you also receive currently time tickets or whatever you call them of persons who may be going through this posting period?

A. Yes sir.

Q. Are they entered?

A. Yes sir.

Q. That time ticket in reference to posting, does that show the date and the number of hours during the day that the posting has been done?

A. Yes sir.

Q. Mr. Faulkner, I must ask you some two or three questions about Mr. E. W. Bugg. There was introduced here in this case an income tax report or some kind of report that your office made to the income tax department showing wages earned during the calendar year 1944 of $55.00. Now, I want you to tell the Court what your records show in reference to the number of vouchers that have been issued to Mr. E. W. Bugg and the amounts of those vouchers and the dates of them.

A. In September, 1944, $20.00 and October, 1944, $35.00.

Q. And are those the vouchers that were shown by your records and from which you made this $55.00 earnings report to the income tax department?

A. It is a carbon copy of the income tax record as made from a carbon copy of these vouchers.

Q. And so you arrive at this figure of $55.00 from carbon copies of two different vouchers that were issued from your office to Mr. Bugg?

A. Yes sir.

Q. Now, when a voucher is issued from your office does your jurisdiction over that voucher cease then?

A. Yes sir.

Q. You don't follow it through and if such voucher were withheld in the paymaster's office or lost or cancelled or anything like that happened to it your office wouldn't know about that?

A. No.

Cross Examination,

By Mr. Jansen:

Q. You don't know whether this voucher for $35.00 has been delivered to Mr. Bugg?

A. No sir, just hearsay only.

Q. And that hearsay is that it has not been delivered, isn't it?

A. Yes sir.

Q. When were these last vouchers issued, the sixty-nine?

A. The sixty-nine, they were issued, some of them two weeks ago.

Q. All of them within the last two weeks?

A. I think I have two here that are in April.

Q. Two in April and otherwise sixty-seven of them within the last two weeks?

A. Yes, in May.

Q. When did you receive your instructions? Who issued them?

A. In the last—during May or last part of April.

Q. You didn't receive any instructions to issue vouchers to these men then back in January?

A. No sir.

By the Court:

Q. Who are they? Is that this group over here in Chattanooga? Are they posters or cubs?

A. Cubs.

Q. Well, is that the group who did not finish their cubbing or were, at any rate, not paid for some part of their cubbing?

A. Yes sir.

Q. But later were ordered to be paid whether they finished their cubbing or not?

A. Yes sir.

Q. That is that group?

A. Yes sir.

By Mr. Jansen:

Q. And those instructions with regard to that group were received within the last ten days?

A. Yes sir.

Q. And not in January. Now, this other list that you offer as part of your testimony, do you have any way of knowing whether vouchers for this last have been delivered to the employees?

A. No sir.

Q. Who checks the returned vouchers after they have been delivered?

A. The Paymaster.

Q. Is that part of your office?

A. No sir.

Q. That is a different office?

A. The Treasurer's department.

By Mr. Whitwell:

Q. Just one or two questions. Mr. Faulkner, this list of those who were not paid currently—I am talking about cubs now, these sixty-nine—for whom vouchers have recently issued, did you get your instructions from the superintendents to issue those vouchers at the time this, we call, pick-up list was sent to your office by the superintendents?

A. It was pick-up men, yes sir.

Q. Well, did you have instructions to enter upon the payroll and issue vouchers for them at the time the lists came in?

A. I don't know. I can't answer that.

Q. All right. Now, about these posters, you say there were eighty of them. Were some of them paid back as far as February, 1945?

A. Fifty-four on the February, 1945 payroll.

Q. And the balance of the list of eighty vouchers have issued more recently, have they?

A. April.

By Mr. Jansen:

Q. You don't mean that they were paid; you mean vouchers were issued for them?

A. Vouchers were issued, yes sir.

Q. Whether they have been delivered or not you don't know?

A. I don't know.

Further this witness saith not.

Testimony of Thomas M. McFarland

The next witness, THOMAS M. McFARLAND, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Mr. McFarland, what position do you hold with the NC&StL Railway?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. Since March, 1943.

Q. Prior to that I presume that you were a fireman?

A. Yes sir.

Q. How long were you a fireman before you became a locomotive engineer?

A. From April in 1940 to March, 1943.

Q. Now, Mr. McFarland, before you became a fireman did you undergo a training period?

A. Yes sir.

Q. And that was back in 1940?

A. Yes sir, in February.

Q. Did you make routine application for position as fireman?

A. Yes sir.

Q. You took a physical examination?

A. Yes sir.

Q. Now, when you made your application were you told by the master mechanic's office that you would have to undergo a training period or cubbing period?

A. Yes sir.

Q. Were you told that you would not be paid for that training period?

A. Yes sir.

Q. Do you know, approximately, how many days you cubbed for the position of fireman?

A. Well, I would say a period that consumed between thirty and thirty-five days. That was actual road work, and written tests, too.

Q. Now, did you cub on both the Nashville Division and the Chattanooga Division?

A. Yes sir.

Q. And upon coming employed, did you establish seniority on both divisions?

A. Yes sir.

Q. Now, during the period of your cubbing did you cub with a regular crew?

A. Yes sir.

Q. Did you get instructions from the regular fireman as to the duties of a fireman?

A. Yes sir.

Q. Did you learn also by watching the fireman perform the different duties of a fireman?

A. Yes sir.

Q. You also were permitted to actually perform the manual activities of a regular fireman, that is, those that he performed and has to know about upon becoming an employee?

A. Yes sir.

Q. Now, Mr. McFarland, while you were cubbing for the position of fireman did you perform any service or any manual activities that you considered speeded up the movement or was beneficial in any way to the Railroad?

A. No sir.

Q. Were you doing it for your sole benefit to learn the duties of the job that you had applied for?

A. Yes sir.

Q. Do you consider that you were saving the Company any money during the time that you were cubbing?

A. No sir.

Q. What is your judgment about whether or not, while you were there training and learning to fire a locomotive, that you were probably an expense by way of burning extra coal?

A. I think so. Yes sir, I was an expense.

Q. Do you know of any other way that you could have qualified yourself for the position which you later got except by undergoing this training period?

A. No sir.

Q. Did you consider that, being permitted to perform the actual manual activities connected with it, you better and faster learned the duties of the job that you had applied for?

A. Yes sir.

Q. Did you have any duty or any responsibility whatever in connection with the movement of that train or its operations?

A. No sir.

Q. Were you required to follow any definite schedule in connection with your cubbing?

A. No sir.

Q. Did you understand while you were cubbing that if you cubbed two or three days and wanted to lay off two or three days that you would be permitted to take up your cubbing and go ahead?

A. Yes sir, I did that. I laid off several days.

Q. You did lay off part of the time?

A. Yes, sir, different hours.

Q. That was perfectly all right with the Company?

A. Yes sir.

Q. Now, I believe you said that back at that time no payments were made to persons while cubbing?

A. No payments.

Q. You understood that all the time?

A. Yes sir.

Q. Do you think you got too much cubbing?

A. No sir, I only received the minimum required for the job.

Q. Have you, since you became a regular fireman, had cubs with you on various occasions learning the duties of the job just in the same way you learned them?

A. Yes sir.

Q. And did you consider that persons cubbing with you speeded up your movement or was any benefit to your train?

A. No sir, I do not consider it any benefit.

Cross Examination,

By Mr. Jansen:

Q. You say, Mr. McFarland, that you consider that you received the minimum amount of cubbing necessary to qualify you for a fireman's job?

A. Well, yes sir. A fireman never becomes what we consider perfect. As long as he is here he has trouble.

Q. You consider that the thirty or thirty-five days was the minimum amount of cubbing to qualify you for a fireman's job, is that right? Is that what you said?

A. That is what I said, yes sir.

Q. You heard the testimony of the other firemen here in court, didn't you?

A. Yes sir.

Q. They said that they had been given a schedule which required them to cub thirty-one to thirty-four days?

A. That is right.

Q. You heard that?

A. Yes sir.

Q. You think that is the minimum amount of time that a man would have to cub in order to qualify for fireman, is that right?

A. I would say it was the minimum for everybody. That is what I cubbed. That is what I would consider. When I started cubbing I was one of the first that had been hired since 1929 and they had no procedure and I cubbed until I felt like I could go out with the traveling fireman and be competent to fire the engine all the way on any job that they had.

By the Court:

Q. You cubbed both divisions?

A. Yes sir, both the Nashville and the Chattanooga.

Q. Does that take more time than if you cubbed only on one?

A. Yes sir—no sir—yes sir, because—in a way it would and in a way it would not. The same type of engines and the same engines are used on both divisions.

Q. It took you sometime to familiarize yourself with the road?

A. That is right, sir. Usually I used about one-half of my time on one division and half of my time on the other division.

By Mr. Jansen:

Q. Well, the Nashville and Chattanooga Divisions, do they include the lines from Hickman to Chattanooga?

A. Yes sir.

Q. The same line the brakemen have been testifying about that they had to cub on as brakemen?

A. Yes sir, that is right.

Q. Then the four separate runs that they have talked about, that is, Hickman to Bruceton, Bruceton to Nashville, Nashville to Cowan and Cowan to Chattanooga?

A. No, I didn't cub the locals like they did.

Q. But I mean those four separate places?

A. That is right, four sections of it.

Q. How long did you lay off?

A. Well, my home is in Shelbyville and I would ride out to Wartrace on a freight train as a cub and would get off the engine and go home for the night and probably come back the next day, not but a night. I didn't stay off any lengthy period, just a matter of going home and exchanging clothes and getting some money and coming back.

Q. Getting some money, you mean to pay your expenses with while you were cubbing?

A. Yes sir.

Q. I got the impression from your direct testimony that you didn't follow through thirty or thirty-five days; that you laid off some in there.

A. No, I wasn't at Nashville the whole time; I wasn't ready for duty, that is, to go out any time. I just would get off at Wartrace and go home.

Q. And then catch the train back the next morning?

A. Whenever I got ready to come back I would come back.

Q. They didn't object to that?

A. No sir.

Q. You lay off now, I suppose, when you want to occasionally?

A. Yes sir.

Q. Did the traveling engineer go with you when you had completed your cubbing?

A. Yes sir, traveling fireman, at that time.

Q. Did the traveling fireman check you at any time prior to the expiration of that thirty or thirty-five days?

A. No.

Q. It wasn't until you had finished the thirty or thirty-five days that the traveling fireman checked you?

A. Yes sir. I told him I was ready to go. I felt that I was competent to do the work.

Q. And it was at the end of thirty or thirty-five days when he checked you, is that right?

A. Well, yes sir, it was. At that time I hadn't completed my written but I had completed my road work when he checked me. He checked me merely to see if I was competent to fire an engine.

Q. Oh yes.

A. But I hadn't completed my written at that time.

Q. It was at the end of thirty or thirty-five days, whatever it was?

A. Yes sir, that period.

Redirect Examination,

By Mr. Whitwell:

Q Mr. McFarland, were you told by the traveling fireman at any time during your cubbing period that when you felt that you had had enough cubbing to let him know and he would make a trip with you, anything like that?

A. That is right, sir.

Q. Now, had you had any prior experience with a locomotive when you began this cubbing experience?

A. No sir.

Q. Everything was brand new to you?

A. That is right.

Q. You had to learn the grades and the location of stations, block signals and all of that?

A. Yes sir.

Q. Did you say that you had no experience, theretofore with stoker-fired engines?

A. No experience whatsoever.

Q. Are there different types of stoker-fired engines on the system?

A. Yes sir.

Q. Do they differ in various particulars?

A. Yes sir.

Q. Was it necessary for you to become familiar with those different types?

A. That is right.

Q. Now, is there a single division on the system that is anything like as long in mileage as the combined Nashville and Chattanooga Divisions?

A. No, the other divisions are much shorter. That is, than the Nashville and Chattanooga Divisions combined, they are much shorter.

Q. You were cubbing two divisions and getting seniority on two divisions, weren't you?

A. That is right.

Recross Examination,

By Mr. Jansen:

Q. Do I understand that you didn't want to go on the payroll until the end of thirty or thirty-five days?

A. No, I didn't say that. I wanted to go on the payroll, I mean I wanted to complete my cubbing and then go on the payroll. That was my understanding that when I completed it and a job was available I would be put on the payroll.

Q. Oh.

A. I mean I would be put on the extra board whenever they got ready for me.

Q. Oh, when they got ready for you?

A. That is right. When the amount of work was so that they needed more men, if I was ready, I would be put on the extra board.

Q. That was the reason that it took you thirty or thirty-five days?

A. No, I didn't say that. I said that was the reason I took the thirty or thirty-five days to make myself competent to fire a locomotive.

Q. Do I understand you mean now—I understand that you didn't want to go on the payroll until the end of thirty or thirty-five days, or was there some other reason for it?

A. There was no reason other than I was supposed to learn to fire a locomotive and after I completed my training, completed my training, then if they wanted to put me on the extra board they could do so.

Q. How did you know when you completed your training?

A. I was o.kayed by the traveling fireman for my road work and by the train rule examiner for the written.

Q. And at any time when you were o.kayed by the traveling engineer then you would have completed your training, is that right?

A. No, I took my written after I completed my traveling.

Q. As far as the road work was concerned, any time you would have been o.kayed by the traveling fireman you would have completed your training?

A. That is right, sir.

Q. Then am I to understand you didn't ask the traveling engineer to o. k. you until after thirty days?

A. No sir. The first time I asked him he said "I will go out with you."

Q. Was there any reason for you not asking sooner?

A. Not in particular, no sir. I just wanted to feel I was competent and when I did feel that I was competent I asked him.

Q. If not in particular, was there, in general, some reason for not asking sooner?

A. No reason at all.

Q. Didn't you feel you were competent after about fifteen days?

A. No sir, I did not.

Q. And so you didn't want to go on the payroll at the end of fifteen days?

A. I was told when I completed my cubbing I would.

Q. That is what I am trying to get, Mr. McFarland. You were told that when you completed your cubbing and you knew that you wouldn't complete your cubbing until the end of thirty or thirty-five days?

A. I knew I wouldn't complete my cubbing until I was competent.

Q. Didn't you have a schedule?

A. No sir.

Q. How did you know when the thirty days was up and that it was time for you to have the traveling engineer to check you or the traveling fireman?

A. I felt like I could do my work.

Q. As a matter of fact, you were told that you had covered all the various sections of the divisions in your cubbing, weren't you?

A. No sir.

Q. And still you wanted to work for nothing for thirty days and spend your money until you thought in your own mind you ought to go on the payroll?

A. I wanted to be competent when I was ready—when I thought I was competent; I wanted to be sure in my own mind that I was competent.

Further this witness saith not.

Mr. Whitwell: Call Mr. Hughes.

The Court: What is the nature of this testimony?

Mr. Whitwell: Your Honor, he is a brakeman who has cubbed recently. I have completed all my major testimony and I thought I might put on a short witness or two relating to brakemen but I will be entirely subject to your Honor's wishes in the matter.

The Court: If it is going to be, in general, the same as this other—

Mr. Whitwell: Yes sir.

The Court: And he is going to say: "I am a brakeman and in all respects I did exactly the same thing as these other people and I studied the duties of a brakeman," which we know is coupling and uncoupling cars and riding them around—

Mr. Whitwell: Yes sir.

The Court: Well, do you think it is necessary?

Mr. Whitwell: The only thing I have in mind is this—I am perfectly willing to close my case here.

The Court: This is Friday afternoon and we will have to have the rebuttal and the oral argument. Now, the Court has other engagements tomorrow and if you gentlemen can't finish this afternoon you are going to have to stay over until Monday and finish Monday. I want you

to know that before you take up a lot of time around here you don't think is necessary.

Mr. Whitwell: Your Honor, I believe I will just close my case here. I do have several other witnesses but they will be cumulative.

The Court: All right. Don't let me over-persuade you. I just want to be frank about the whole thing. You want to rest then, Counsel?

Mr. Whitwell: Yes sir, we will rest, your Honor.

The Court: All right, is there any rebuttal?

Mr. Jansen: I have one witness and one other point. One point that I had in mind is a question that perhaps can be cleared up by counsel, and I wanted to ask the General Manager whether or not you had ever applied for a license under Section 14 of the Act.

Mr. Hunt: There is no question about that. Of course, I am not trying to answer specifically but generally, relating to posters, not cubs, involved in this, and not firemen and brakemen, there has been no application for a license.

Mr. Jansen: And then I had one witness I want to ask one question.

PLAINTIFF'S REBUTTAL EVIDENCE.

W. F. SEIGENTHALER, being called in rebuttal and being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is W. F. Seigenthaler?
A. Yes sir.
Q. How old are you?
A. Fifty eight.
Q. You live in Nashville?
A. Yes sir.
Q. You are employed by the NC&StL Railway as engineer?
A. Yes sir.

Q. And before that you were employed by them as a fireman?

A. Yes sir.

Q. Now, since you have been on the regular payroll of the NC&StL Railway I want to ask you one question: if you have, in transferring from one division of the railroad to another, been required to cub without compensation?

A. Yes sir.

Q. Tell us about it.

A. I was promoted July 12, 1940, and was on the Chattanooga Division and before I could run on the Nashville Division I was required to cub that division and familiarize myself with any changes that had been made during my absence.

Q. How many trips did you make cubbing?

A. I made two round trips to Bruceton and back and one trip to Martin.

Q. Were you paid for that?

A. No sir.

Cross Examination.

By Mr. Whitwell:

Q. I want to ask you this, Sir: Were you an engineer during that period, at that time?

A. Yes sir.

Q. You were making this run that you speak of or these runs on another division and you were in the class of an engineer at that time?

A. Yes sir.

Q. Now, when you were making those runs were you actually operating the locomotive or just riding the locomotive with the regular engineer?

A. I operated the locomotive except one leg of it, one one hundred miles. In other words, I handled the engine with the engineer standing behind me.

By the Court:

Q. The regular engineer was there?

A. Standing behind me.

Q. You were simply acting in his place in learning the road and the engine?

A. Yes sir, in other words, I was handling the throttle and the airbrake.

Q. When was that?

A. That was in July, 1940 when I was first promoted.

Q. I mean when you were making this cubbing run?

A. I couldn't tell you the exact date.

Q. Well, not the date, just approximately.

A. It was in July sometime.

Q. 1940?

A. Yes sir.

Mr. Whitwell: I just want to ask this for my own information. I am going fishing a little bit.

Q. Were you paid the contractual wage rate during the time that you were making that run that you considered yourself cubbing?

A. No sir, I received no pay whatever for it.

Q. Does the organization have any rules and regulations or agreement in reference to that?

A. None whatever.

By the Court:

Q. Do you know any other instance where that practice was followed that some old already-qualified engineer changed divisions and cubbed without pay?

A. The only one I could state myself.

Q. You don't know of any others?

A. Not that I know of; not that I have personal knowledge of.

By Mr. Jansen:

Q. I will ask you—you are familiar generally with the practice of the Railroad?

A. Yes sir.

Q. Do you know if that is the practice with reference to others, not as a specific case, but do you know if that is the practice?

A. I might explain in this manner. When I was set up conditions were different to what exist now and it is customary now that when these men are set up that they place the traveling engineer with them the first trip. In other

words, the traveling engineer instructs them and they operate the engine and they receive pay for it.

By the Court:

Q. And get the standard rate of pay?

A. Yes sir.

Q. Just supervised by the traveling engineer?

A. Yes sir.

Q. How long has that practice been going on?

A. I couldn't tell you, Judge.

Q. Well, about how long?

A. Well, now, guessing—

Q. Well, let's not guess, if you don't know.

A. It has been done for the last two years, eighteen months or two years.

By Mr. Jansen:

Q. You mean that is something that came up because of the war emergency and the need of men?

A. On account of the scarcity of manpower.

Q. But before it was the practice to do as they did with you?

A. Yes sir.

By Mr. Whitwell:

Q. If I understood you, you know of no other case where that has happened except your own case, do you?

A. My own case that I have personal knowledge of.

Q. You don't know that the Company or the management had any knowledge of that and you reported nothing about that trip, did you?

A. I was instructed by the engine dispatcher that before I could run the Nashville Division I would have to cub the road.

Q. But you know of no other case except your own where that has happened?

A. No sir, not that I know of.

Further this witness saith not.

The Court: Anything else for the plaintiff?

Mr. Jansen: We rest.

This was all the evidence offered on the hearing of this case.

(Argument of counsel.)

The Court: All right, I will take the matter under advisement and send you copy of my findings when they are reached.

(Adjournment.)

ORDER.

(Received for Entry, 7-12-1945.)

This cause came on this date to be heard on the motion of appellant that the exhibits introduced in evidence at the trial of this cause be sent to the United States Circuit Court of Appeals for the Sixth Circuit in their original form, and it appearing that Government's Exhibits 1, 3 and 4 are appellee's personnel records which must be retained by appellee at its office;

Now, therefore, by agreement of counsel It Is Ordered that photographs be substituted for the originals of Government's Exhibits 1, 3 and 4, and that said photographs be forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, in lieu of said

original exhibits, and that all other exhibits be sent up in their original form subject to the further order of the Circuit Court of Appeals with respect thereto.

This the 12th day of July, 1945.

(S) ELMER D. DAVIES,
United States District Judge.

Approved for Entry:

JETER S. RAY,
PAUL M. CADRA,
Attorneys for Appellant.

(S) WALTON WHITWELL,
(S) EDWIN F. HUNT,
Attorneys for Appellee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed May 22, 1945.)

The question here presented is whether or not persons in training for positions with the defendant Railway are, during their training period, "employees" within the meaning of the Fair Labor Standards Act of 1938, 29 USCA 201, et seq. Asserting that they are employees, and that defendant is in violation of the Act with respect to them, plaintiff Administrator seeks injunctive relief to compel future obedience to the Act.

The controversy concerns: First, persons in training for firemen, brakemen and switchmen, both in the yards and on the main line, called "cubs." Second, persons in training for clerks, stenographers, callers, messengers, and the like, called "posters."

It is obvious that an inexperienced person cannot safely perform the intricate and hazardous duties of a railway fireman, brakeman or switchman. Experience and specialized learning are essential, not only to efficiency, but to the public safety and to the safety of the trainmen. Even though a person is generally experienced in railroading, he must still learn the yards, tracks, signals, mechanical devices, and many other things pertaining to the particular railroad on which he is employed, before he can perform his duties with safety to himself and to the public.

In keeping with the custom of all railroads, this defendant requires applicants for such employment to undergo a period of preliminary training, called "cubbing," under the tutelage of a regular employee performing the same type of work. This training period covers from one to three weeks, depending upon the student's aptitude, during which time the trainee accompanies a regular crew who show him on the job how to perform the duties of that employment. The student learns not only by observation, but by actually performing the duties of the employment he seeks, always under the immediate supervision of a regular employee. When the student has apparently become proficient he is given an examination touching his qualifications. If he thus demonstrates his proficiency, he is then, but not before, placed upon the "extra board" as an employee, and called into service as needed. It is only from that time that they are regarded as employees. Their seniority with other employees dates from that time, not from the time they commenced training. This practice is approved by the railway brotherhoods who bargain with the employer on behalf of its employees. Under these contracts one is not deemed an employee until he has finished his training and has been listed on the extra board.

As experience is also necessary in the second classification (clerks, messengers, etc.), though perhaps not to the same extent as in the case of the trainmen, applicants for these positions are required, in the same manner, to undergo a brief period of preliminary training, called

"posting," under a regular employee performing that type of work. Although their duties are clerical or non-operational in character, many of them are frequently required to be in and about the yards, where their own personal safety is at stake. Even the purely clerical employee must have the necessary experience to fit him to work harmoniously as an integral part of a highly specialized transportation system. The training period for these students is from three to ten days, after which they are put into a regular job when needed. During this training period these students accompany a regular employee, or under the guidance of a regular employee perform the duties of the job for which they are fitting themselves.

The plaintiff Administrator contends, and defendant denies, that during this training period these students or trainees are also "employees" within the meaning of the Act and that they should be compensated, and records kept for them, as required by the Act and regulations thereunder.

When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay

therefor under the labor contracts. Students are present on the job solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called.

For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied. It is indispensable to the existence of such a contract that the employee perform some service for the benefit of the employer, or in his interest, of which the payment of wages is the quid pro quo. The performance of such a service is here wholly lacking, as is all other indicia of employment, including the authority to direct and control the activities of the employee. Thus during their training period these trainees act only for their own benefit and in their own interest. Their activities are wholly voluntary. No measurable benefit flows to the Company, for which the law would imply an obligation to pay. It is in this respect that this case fundamentally differs from Walling v. Needlecrafts (C. C. A. 6) 139 Fed. (2d) 60, relied on by plaintiff. There the workers labored and produced for the benefit of the employer in circumstances in which the law will imply an obligation

to pay them, even though their work was not performed under the direct supervision of the employer. Here, the trainee works, not for the Company, but for himself and produces nothing of benefit to the Company. The law therefore implies no obligation to pay him.

Save in one particular, the "cub" or trainman students here involved are the exact counterparts of those held to be mere students, not employees, in Walling v. Jacksonville Terminal Company (C. C. A.-5, decided April 23, 1945), ... Fed. (2d) ... In the Jacksonville Terminal case the trainees received no remuneration whatever. Since about December 1, 1943, the "cub" trainees here involved have received a flat $5.00 per day, except for a short period when such payments were made only to those who completed their training. This payment is now made to all "cubs," regardless of whether their training is completed. The Company is endeavoring to also pay those from whom such payments were formerly withheld because they did not complete their training. As rapidly as these former uncompensated trainees can be located their back compensation is paid them.

The payment of wages is one of the indicia of a contract of employment. This $5.00 per day paid to the "cub" trainees, however, is more a gratuity than compensation, for these trainees render no beneficial service to the Company to earn any "wages," for the recipients of these payments are working for themselves, not for the Company. Nor are they under the direction or control of the Company as an employee would be.

These payments were commenced in 1943, not because the Company considered that the trainees performed services of value, but pursuant to the recommendation of a joint committee of railway and labor executives, which committee referred to the payment as "pre-employment" pay, and recommended that the payments be made because many of these trainees were married men with dependents who could not afford to undergo a period of training without some source of income. In making the payments the Company regards them as incentive pay, not wages.

The Court therefore holds that this gratuitous payment by the Company of "pre-employment" pay does not fundamentally alter the status of these "cub" trainees, and that they are not employees within the meaning of the Act, for the reasons so well stated by Judge Sibley in the Jacksonville Terminal Company case, supra.

But even if they were employees, this payment substantially complies with the requirements of the Act. Most of these "cubs" devoted eight hours a day, at most, to their training, so these are paid at the rate of sixty-two and one-half cents per hour. Some of them, while "cubbing" on local main line trains, are in training twelve hours per day, which produces a compensation of a little more than forty cents per hour. It is only in the relatively small number of cases where "cubs" are training on main line trains which are late in reaching their ultimate destination that they are in training more than twelve hours per day so that the sum actually received by them in such instances falls slightly below the forty cents per hour minimum required by the Act. These instances are relatively few. So in a broad and substantial sense, and subject to occasional exceptions, these "cubs" actually received compensation in accordance with the Act.

As to the "poster" (office) trainees: For the same general reasons above stated, the Court holds that these are not "employees" within the meaning of the Act. But even if they are, the Company is now and for several years past has been complying with the Act as to them, and apparently intends in good faith to do so in the future.

Originally, these trainees were not compensated during their training period. Beginning, however, about 1941, the management of the Company, although not conceding then or now that they are "employees," issued instructions to pay them a sum equal to the minimum requirements of the Act, and to keep the records on them required by the Act. These instructions were generally carried out over the defendant's system, and still are. Due however to a misunderstanding of these instructions at

the Craven yards at Chattanooga, these "poster" trainees were not so paid for a substantial period of time after the custom of paying such trainees was instituted. When this failure was discovered, it was immediately corrected by issuing pay vouchers covering this period, many of which have been delivered to the payees, and the remainder being delivered as rapidly as the former trainees can be located for that purpose. All such trainees have been paid in accordance with the Act, and proper records kept for six months or more last past. So even if they are "employees," which the Court holds that they are not, there is no necessity for an injunction, the purpose of an injunction being to prevent future violations, not to punish past violations.

Nor are these trainees "learners" as contemplated by the Act. A "learner" is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the "learner," though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The Company gains no measurable benefit from their activities.

The Court holds that none of these trainees are "employees" within the meaning of the Act. But even if they are employees, the payments voluntarily made to them, and the records now kept, are sufficient to satisfy the requirements of the Act.

Nashville, Tennessee,
May 22, 1945.

/s/ LOUIE W. STRUM,
United States District Judge.

FINAL JUDGMENT.

(Received for Entry, May 22, 1945.)

The Court having heard the evidence of the respective parties, and the argument of their counsel, it is upon consideration thereof

Ordered and Adjudged:

1. The relief sought by the complaint herein is denied, and the defendant shall go hence without day.

Done and ordered at Nashville, Tennessee, May 22, 1945.

/s/ LOUIE W. STRUM,
United States District Judge.

NOTICE OF APPEAL.

(Filed July 3, 1945.)

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above styled action,

hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action on May 22, 1945.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:

c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tenn.,

or

Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

STATEMENT OF POINTS.

(Filed July 3, 1945.)

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellant in the above-entitled action, now designates the points on which he will rely in the prosecution of his appeal from the judgment entered in this action on May 22, 1945:

1. That the court erred in ruling that trainees for the jobs of porters, callers, messengers, stenographers, clerks, switchmen, firemen, and brakemen at defendant's railroad office, yard, and system were not employees of the defendant within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs.

2. That the court erred in denying the plaintiff an injunction as prayed in his complaint.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

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or
Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

DESIGNATION OF RECORD.

(Filed July 3, 1945.)

To: The Clerk of the District Court of the United States for the Middle District of Tennessee:

In accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, you are requested to make a transcript of the record in the above styled action, pursuant to the notice of appeal filed therein, said transcript of record to contain the following:

1. Plaintiff's complaint.

2. Defendant's Answer.

3. Deposition of John Harrison Whitten taken by plaintiff in Chattanooga, Tennessee on May 8 and 9, 1945.

4. Complete transcription of the proceedings at the trial beginning on May 16, 1945, including all exhibits.

5. Findings of fact and conclusions of law dated and filed May 22, 1945.

6. Judgment entered and dated May 22, 1945.

7. Notice of appeal with date of filing.

8. The statement of points.

9. This designation.

You are requested to prepare said transcript of record in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States and to transmit the same to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit within 40 days

from the date of the notice of appeal, or within such extended period, not exceeding 90 days from said date as may be ordered by the District Judge.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:

c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tennessee,

or

Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

I, Jeter S. Ray, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby certify that on the 3 day of July, 1945, a copy of the foregoing designation of record was mailed to Wm. H. Swiggart, Esquire, Walton Whitwell, Esquire, and Edwin F. Hunt, Esquire, attorneys of record for The Nashville, Chattanooga and St. Louis Railway in Government franked envelopes to 930 Broad Street, Nashville, Tennessee, the same being their last known address.

/s/ JETER S. RAY.

CERTIFICATE OF CLERK.

I, L. B. Ormes, Clerk of the District Court of the United States, in and for the Middle District of Tennessee, Nashville Division, do hereby certify that the foregoing papers contain a true, correct and complete record as called for in the designation of portions of the record on appeal filed by attorneys for the Appellee-Defendant herein, in the matter set out in the caption hereto, as the same appears from the records in this cause and the files of this office.

Witness my hand as Clerk and seal of said court, at my office in Nashville, Davidson County, Tennessee, Division and District aforesaid, on this the 10th day of July, 1945 and the Independence of the United States of America, the 169th year.

L. B. ORMES, Clerk,
United States District Court,

By PHIL McCABE,
Deputy Clerk.

(Seal)

TRANSCRIPT OF PROCEEDINGS FOR CERTIORARI APPLICATION

Cause argued and submitted

April 12, 1946

Before HICKS, ALLEN, and MILLER, JJ.

This cause is argued by George W. Jansen and Morton Liftin for Appellant and by Walton Whitwell for Appellee and is submitted to the Court.

Judgment

Entered June 1, 1946

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

Opinion

Filed June 1, 1946

United States Circuit Court of Appeals, Sixth Circuit

No. 10070

L. METCALFE WALLING, ADMINISTRATOR WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLEE

Appeal from the District Court of the United States for the Middle District of Tennessee

Decided June 1, 1946

Before HICKS, ALLEN, and MILLER, Circuit Judges

HICKS, Circuit Judge. Appellee, The Nashville, Chattanooga & St. Louis Railway, is an interstate common carrier of passen-

gers for hire. It operates in the States of Tennessee, Alabama, Georgia and Kentucky, and maintains offices, shops, yards and terminals at various places over its system and employs approximately 12,000 people.

On December 19, 1944, appellant filed his complaint against appellee under Sec. 17 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 USC, sec. 201 et seq.) to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act. The complaint alleged that it had violated the minimum wage and record keeping provisions of the Act with respect to 225 employees, including firemen, switchmen, stenographers, yard clerks, office clerks, messengers, callers and porters during their so-called "training periods."

Appellee's principal defense was that these "trainees" were not "employees" within the meaning of the Act.

The District Court filed findings of fact and conclusions of law and denied the relief sought, chiefly upon the authority of Walling v. Jacksonville Terminal Co., 148 Fed. (2d) 768 (C. C. A. 5).[1]

The persons involved were in training for positions as porters, callers, messengers, stenographers and clerks, who were commonly called "posters" and as firemen, switchmen and brakemen, who were commonly called "cubs." It is uncontroverted that in each of these different positions a period of preliminary training is essential to the efficiency of the applicant therefor, as well as his safety and that of the public. It would be unthinkable to subject the lives of employees and passengers, to say nothing of property, to the hazards which would arise from the use of untrained and incompetent servants. A training period is mandatory.

Upon the question whether such persons are trainees or employees, the court found the following material facts:

> "When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence

[1] See also *L. Metcalfe Walling, Admr. v. Portland Terminal Co.*, decided by the First Circuit on April 29, 1946.

does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay therefor under the labor contracts. Students are present on the job solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called."

Without going into detail, we conclude that these findings have ample support in the evidence. They are certainly not "clearly erroneous" and we are bound by them. See Federal Rules of Civil Procedure, Rule 52 (28 USCA following 723c). We have heretofore consistently followed this rule. Hazeltine Corp. v. Crosley Corp., 130 Fed. (2d) 344 (C. C. A. 6). There is indeed no special controversy over the facts.

It follows that there is presented for review a clear cut question of law, whether persons in training for the positions indicated above were "employees" of appellee during their training period within the meaning of the Fair Labor Standards Act of 1938. It is our duty to review this question; and we remain free to draw from the findings the ultimate inferences and conclusions. Letcher County v. DeFoe, 151 Fed. (2d) 987, 990 (C. C. A. 6); Harris Stanley Coal & Land Co. v. C. & O. Ry. Co., decided by us April 3, 1946.

Section 3 (c) of the Act defines "employee" as an individual employed by an employer; and Sec. 3 (g) defines the word "employ," to mean "to suffer or permit" the trainees to work. See Walling v. Sanders, 136 Fed. (2d) 78, 81 (C. C. A. 6). Appellant's difficulty here is that the findings conclusively establish that appellee did

not "suffer or permit" the trainees to work for it. See Walling v. Jacksonville Terminal Co., supra (148 Fed. 2d, at page 770). The fact that the trainees necessarily used the facilities of appellee during their training period does not carry an inference that they worked for appellee. If trainees are to be considered as "employees" then the long entertained concept of voluntary apprenticeship passes entirely away. The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we are satisfied with the reasoning thereof. To say more would constitute surplusage.

The decree is affirmed upon the authority of that case and for the reasons indicated therein.

Appellee insists that, even if the provisions of the Act are applicable to trainees as employees, nevertheless it is as a matter of fact complying with the Act and that therefore there is no real basis for an injunction. The court so held but in the view we take of the case no such holding is material to decision.

Affirmed.

ALLEN, Circuit Judge, dissenting. I cannot concur in the conclusion of my colleagues that the cubs and posters are not employees within the meaning of the Fair Labor Standards Act. It seems to me that § 3 (g), which provides that "employ" includes "to suffer or permit to work," was drawn specifically with such loose arrangements as cubbing and posting in mind. Incidentally, the holding seems to contravene a decision of this court. Huntsicker v. Illinois Central Ry. Co., 129 Fed. 548, which held that a trainee was the servant of the railway.

The record presents ample evidence that the cubs and posters not only were instructed as to their duties, but actually did the same work during their training period as they did upon becoming regular employees. In fact they learned the duties by working under supervision. It was the frequent practice of the railway, upon the absence of one of its regular employees, to substitute one of the cubs, and for such service to pay him the usual remuneration for that particular job. The next day this cub might be returned to his trainee status.

The District Court found that the trainees "perform work," but that this work did not benefit the Company. In at least certain instances it seems to me that there is no evidence in support of this finding. Three of the witnesses acted as cubs for periods so long, Arnold, twenty-two days, Prince, five weeks, Rosenheim, six weeks, that their work must have had some value or they would not have been tolerated. Boyd, Justice and Eason had had previous railroad experience, but were compelled to cub. Childers, who had twelve years previous experience in a shipping office, was forced to

cub in clerical work more than two weeks. It is argued that the cubs were not compelled to take their training at any specific time, but while on the trains in the yards and on duty in the offices they were subject to the railroad's control. I think that work performed by such trained persons clearly benefited the company, and that there is no substantial evidence to the contrary.

However, the statutory test is not benefit but whether these cubs and posters were suffered or permitted to work. If they were they are employees. Plainly they were permitted to work, and actually did work. Since they spent time on the employer's premises subject to call at least for certain periods, the time they spent was working time within the Fair Labor Standards Act. Armour & Co. v. Wantick, 323 U. S. 126, 132, 133.

The decree should be reversed.

United States Circuit Court of Appeals

for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of L. Metcalfe Walling, Admr., vs. Nashville, Chattanooga & St. Louis Railway, No. 10070, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 15th day of July A. D. 1946.

[SEAL.]

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1944.

No. 4111.

L. METCALFE WALLING,

Administrator of the Wage and Hour Division,
U. S. Department of Labor,

PLAINTIFF, APPELLANT,

v.

PORTLAND TERMINAL COMPANY,

DEFENDANT, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MAINE,
FROM JUDGMENT (PETERS, J.), JUNE 20, 1945.

TRANSCRIPT OF RECORD.

WILLIAM S. TYSON, ACTING SOLICITOR,
JETER S. RAY, ASSISTANT SOLICITOR,
GEORGE H. FOLEY, REGIONAL ATTORNEY,
GEORGE W. JANSEN, SUPERVISING ATTORNEY,
HARRY A. TUELL, SENIOR ATTORNEY,
for Appellant.

E. SPENCER MILLER,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1944.

No. 4111.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
U. S. Department of Labor,
PLAINTIFF, APPELLANT,

v.

PORTLAND TERMINAL COMPANY,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

(Filed in Circuit Court of Appeals August 22, 1945.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MAINE.

CIVIL ACTION, FILE NO. 230.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor, Plaintiff,

v.

PORTLAND TERMINAL COMPANY, Defendant.

COMPLAINT

[Filed January 17, 1945.]

I. Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25,

1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II. Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Maine, having its principal office and place of business at 222 St. John Street in the City of Portland, State of Maine, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged in the operation, as instrumentalities of interstate commerce, of a railway system, shops, yards, stations, terminals and other railway facilities in and about the railway terminal area at Portland, Maine, which were and are engaged in the interstate transportation of passengers, freight, mail, express, and baggage, and were and are operating in interstate commerce to and from states other than the State of Maine, and in furnishing railway terminal facilities to other railroads engaged in interstate commerce.

IV. At all times hereinafter mentioned, defendant employed and is employing approximately 1150 employees in and about its railway system, shops, yards, stations, terminals, and other railway facilities, in the operation thereof as essential instrumentalities of interstate commerce. Substantially all of the duties performed by defendant's employees are essential to the movement in interstate commerce of locomotives, cars, trains, persons, freight, express, mail, and baggage in the active course of transportation to and from other states than the State of Maine, and are an essential and integral part of interstate commerce.

V. Defendant repeatedly has violated and is violating the provisions of Sections 6 and 15(a)(2) of the Act by

paying to many of its employees, for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid, wages at rates less than thirty (30) cents an hour during the period from October 24, 1940, to March 1, 1941, since March 1, 1941, less than thirty-six (36) cents an hour and since August 31, 1942, less than forty (40) cents an hour, said rates of thirty-six (36) cents and forty (40) cents an hour being the minimum-wage rates made applicable to defendant and its said employees by the wage orders for the Railroad Carrier Industry heretofore duly promulgated pursuant to Sections 5 and 8 of the Act by the Administator of the Wage and Hour Division, United States Department of Labor and which, after publication in the Federal Register, became effective March 1, 1941, and August 31, 1942, respectively. A copy of the said wage orders is attached hereto as Exhibit A.

VI. On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII. Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Section 11(c) and 15(a)(5) of the Act, in that since October 24, 1940, it has failed to make, keep, and preserve adequate and accurate records of its em-

ployees referred to as "strikers" and "trainees" as to the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

VIII. The violations alleged in paragraph V and VII hereof occurred with reference to approximately 50 of defendant's employees, including road brakemen, yard brakemen, and locomotive firemen, during so-called training periods, during which time said employees were and are actively engaged in the performance or operation of some essential phase of defendant's activities or facilities. Prior to October 1, 1943, these training periods normally lasted for approximately two weeks, during which said employees received no compensation for their time spent or hours worked, were not listed or carried on defendant's payrolls, and no records were kept of their hours of work. At the beginning of this period, employees designated as "strikers" or "trainees" were required to learn the duties of the position for which they applied by reporting for a definite eight-hour shift, under the supervision of an experienced employee of defendant, and performing, after a short period of observation, the actual tasks involved in that position. At the completion of the training period, these "strikers" or "trainees" were placed on defendant's payroll and paid thereafter at the established rate for an employee in that position.

For the period since October 1, 1943, the training periods

have been shortened so that they range from a few days to not over ten days. The "strikers" or "trainees" are required to work a fixed eight-hour shift, and have no discretion as to the shift which they must work. The short period of observation is dispensed with and performance of actual tasks involved, under the supervision of an experienced employee of the defendant, starts immediately. When the "striker" or "trainee" is considered qualified, he is placed on defendant's payroll and is then paid $4.00 per day for each day of the training period. When he fails to complete the training period, or fails to qualify for any reason whatever, no compensation is paid for time spent and hours worked during that period.

IX. Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

(s) DOUGLAS B. MAGGS,
Solicitor,

(s) ARCHIBALD COX,
Associate Solicitor,

(s) GEORGE H. FOLEY,
Regional Attorney,

(s) HARRY A. TUELL,
Attorney.

Post Office Address:
294 Washington Street, Boston 8, Massachusetts.

EXHIBIT A

For release Friday, February 14, 1941. R-1277

U. S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, WASHINGTON

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION

IN THE MATTER OF THE RECOMMENDATION OF INDUSTRY COMMITTEE NO. 9 FOR MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WAGE ORDER

Effective March 1, 1941

[Filed in Clerk's Office, January 17, 1945.]

Part 591

WAGE ORDER MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WHEREAS, on November 2, 1939, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 34, appointed Industry Committee No. 9 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

WHEREAS, the Committee included four disinterested per-

sons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

WHEREAS, on August 15, 1940, after investigation of conditions in the industry, the Committee filed with the Administrator a report containing its recommendations for a 36-cent-per-hour minimum wage rate in the Trunk Line Division of the Railroad Carrier Industry, and for a 33-cent-per-hour minimum wage rate in the short line division of the Railroad Carrier Industry; and

WHEREAS, after notice published in the Federal Register on August 23, 1940, Henry T. Hunt, Esquire, the presiding officer designated by the Administrator, held a public hearing upon the Committee's recommendations at Washington, D. C., on September 23 and 24, 1940, at which all interested persons were given an opportunity to be heard; and

WHEREAS, the complete record of the proceeding before the presiding officer was transmitted to the Administrator; and

WHEREAS, all persons appearing at said public hearing before the presiding officer were given leave to file briefs on or before November 18, 1940; and

WHEREAS, oral argument was held on November 25, 1940, before the Administrator and

WHEREAS, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 34, are made in accordance with

law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

WHEREAS, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendatioss of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, Washington, D. C.;

NOW, THEREFORE, IT IS ORDERED THAT:

SECTION 591.1—APPROVAL OF RECOMMENDATIONS OF INDUSTRY COMMITTEE.

The Committee's recommendations are hereby approved, and, in accordance with such recommendations,

SECTION 591.2—WAGE RATES.

(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Trunk Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce;

(b) Wages at the rate of not less than 33 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Short Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

SECTION 591.3—POSTING OF NOTICES.

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such

notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

SECTION 591.4—DEFINITION OF RAILROAD CARRIER INDUSTRY AND DIVISIONS THEREOF.

The Railroad Carrier Industry and the divisions thereof to which this order shall apply are hereby defined as follows:

For the purpose of this order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(a) The term "Trunk Line Division," as used in

this order, means the industry carried on (1) by any express company, switching company, terminal company, or sleeping-car company subject to part I of the Interstate Commerce Act, (2) by any carrier by railroad subject to part I of the Interstate Commerce Act having annual operating revenues of more than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and (3) by any company which is directly or indirectly owned or controlled by one or more such carriers, by one or more carriers under (b) hereof or by one or more such carriers jointly with one or more carriers under (b) hereof or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Trunk Line Division" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(b) The term "Short Line Division," as used in this order, means the industry carried on by any carrier by railroad, subject to part I of the Interstate Commerce Act, having annual operating revenues of less than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Com-

merce Commission or other regulatory body, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such carrier by railroad: *Provided, however,* That the term "Short Line Division" shall not include the industry carried on (1) by any carrier or company included within paragraph (a) hereof or (2) by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

SECTION 591.5—EFFECTIVE DATE.

This Wage Order shall become effective March 1, 1941.

Signed at Washington, D. C., ths 12th day of February, 1941. Sections 591.1 to 591.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29, U.S.C., Supp. IV, 208.

PHILIP B. FLEMING,
ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR.

Published in Federal Register, February 14, 1941.

For Release Saturday, August 15, 1942. R-1848

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

TITLE 29 — LABOR
CHAPTER V — WAGE AND HOUR DIVISION

IN THE MATTER OF THE RECOMMENDATIONS OF INDUSTRY COMMITTEE NO. 44 FOR MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WAGE ORDER

Effective August 31, 1942.

Part 624—Minimum Wage Rates in the Railroad Carrier Industry.

WHEREAS, on April 4, 1942, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 147, appointed Industry Committee No. 44 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

WHEREAS, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

WHEREAS, on April 29, 1942, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing its recommendations for a 40 cent per hour minimum wage rate in the Railroad Carrier Industry; and

WHEREAS, after notice published in the Federal Register on June 23, 1942, Major Robert N Campbell, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at New York, New York, on July 15, 1942, at which all interested persons were given an opportunity to be heard; and

WHEREAS, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

WHEREAS, although all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before August 5, 1942, no briefs were filed; and

WHEREAS, the Administrator, upon reviewing all the evidence adduced in this proceeding and given consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 147 are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

WHEREAS, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendations of Industry Committee No. 44 for a Minimum Wage Rate in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, 165 West 46 Street, New York, New York.

NOW, THEREFORE, IT IS ORDERED THAT:

SECTION 624.1—APPROVAL OF RECOMMENDATIONS OF INDUSTRY COMMITTEE.

The Committee's recommendations are hereby approved, and in accordance with such recommendations,

SECTION 624.2—WAGE RATE.

Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

SECTION 624.3—POSTING OF NOTICES.

Every employer employing any employees so engaged

in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

SECTION 624.4—DEFINITION OF RAILROAD CARRIER INDUSTRY.

The Railroad Carrier Industry to which this Order shall apply is hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or carrier by railroad, subject to Part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

SECTION 624.5—EFFECTIVE DATE.

This Wage Order shall become effective August 31, 1942.

Signed at New York, N. Y., this 13th day of August, 1942.

Sections 624.1 to 624.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U.S.C., Sup. IV, 208.

L. METCALFE WALLING,
ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR.

Published in Federal Register August 15, 1942.

[Title omitted.]

AMENDED ANSWER

[Filed April 3, 1945.]

I. The Complaint fails to state a claim against Defendant upon which relief can be granted.

II. Defendant admits the allegations contained in Paragraphs I, II, III and V of the Complaint.

III. Defendant denies the allegations contained in Paragraph V of the Complaint.

IV. Defendant admits the allegations contained in Paragraph VI of the Complaint.

V. Defendant denies the allegations contained in Paragraphs VII, VIII and IX of the Complaint.

VI. Further answering the Defendant says (1) that the Defendant is now and was at the time of the filing of the Complaint and for many years prior thereto engaged in the practice of training applicants for employment with it as yard brakemen; (2) that such applicants during the course of such training are sometimes referred to as "trainees," "strikers" or "students", and are hereinafter referred to as "trainees"; (3) that such "trainees" are trained for a period varying from two or three days to

two weeks (depending on the progress or prior experience of the particular applicant, the average training period being from six to ten days) in the yards and on the trains of the Defendant; (4) that such "trainees" are assigned to yard crews for training, such yard crews consisting at all times of a regularly employed conductor and two regularly employed brakemen qualified and competent to fully perform all of the duties assigned to such yard crews and that all such duties are fully performed by the regular members of such yard crews except such acts as are delegated to and performed by such "trainees" as an incident of their training and in the presence and under the direct supervision of the regular members of such yard crews; (5) that the presence of "trainees" in the yards or on the trains of the Defendant does not increase efficiency of operation of such yards or trains and does not result in any saving of expense to the Defendant as the acts performed by such "trainees" would otherwise be performed by the employees then engaged in instructing them; (6) that prior to October 1, 1943, such "trainees" received no compensation from the Defendant; (7) that since October 1, 1943, pursuant to an agreement entered into between the Defendant and the Brotherhood of Railroad Trainmen, the "trainees" who have completed their course of training and thereafter have been accepted by the Defendant for and have taken employment have received allowances as follows:

> *Student Brakemen*—"$4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the student to devote not less than eight (8) hours each day to the service";

(8) that since October 1, 1943, "trainees" who have not completed their training or who after completing their training have not entered the employ of the Defendant,

have not received any compensation or allowances from the Defendant; (9) that such "trainees" have not been and are not accepted for employment after completion of their training unless and until they have passed examinations on the applicable operating and working rules and regulations of the Defendant; (10) that the Defendant has never considered, dealt with, or treated the "trainees" as its employees and that such "trainees" are not in fact its employees; (11) that each "trainee" upon making his application is advised by the Defendant and enters the training period with the knowledge and upon the understanding that employment is subject to prior completion of training, passing of the required examinations and approval of a designated officer of the Defendant and until such conditions have been completed he is not an employee and is not paid; (12) that the training practice followed by the Defendant is of long standing in the railroad industry and has been followed generally by railroads and terminal companies for many years.

Wherefore, the Defendant prays:

(a) That the Complaint of the Plaintiff be dismissed, and

(b) That the Court award to the Defendant its costs.

Dated: March 23, 1945.

PORTLAND TERMINAL COMPANY, *Defendant*,
By (s) LEONARD A. PIERCE,
(s) EDWARD W. ATWOOD,
Its Attorneys.
465 Congress Street, Portland, Maine.

The Plaintiff hereby consents to the amending of the Defendant's Answer heretofore filed by substituting and filing in lieu thereof this Amended Answer.

GEORGE W. JENSEN,
One of the Attorneys for the Plaintiff,
L. METCALFE WALLING, ADMINISTRATOR.

[Title omitted.]

TRANSCRIPT OF TESTIMONY

U. S. Court House,
Portland, Maine, 5th April, 1945.

The above entitled cause came on for hearing at ten-fifteen o'clock, Eastern War Time, on the above date, at the U. S. Court House, Portland, Maine, before Hon. John A. Peters, U. S. District Judge, without jury.

Appearances:

For Plaintiff: George W. Jansen, Esq.,
Supervising Attorney,
Wage and Hour Division, Dept. of Labor,
Washington, D. C.
Harry A. Tuell, Esq.,
Wage and Hour Division, Dept. of Labor,
294 Washington Street, Boston, Mass.

For Defendant: Leonard A. Pierce, Esq.,
Cook, Hutchinson, Pierce & Connell,
Portland, Maine.
E. Spencer Miller, Esq.,
232 St. John Street, Portland, Maine.

Mr. Jansen: May it please the Court, the issue in this case by the pleadings is pretty much simplified. I left with Court and counsel yesterday a copy of our preliminary brief. The only issue involved in the case is whether or not the defendant has violated the provisions of Section 6 of the Fair Labor Standards Act in failing to pay trainees during the training period, and the provisions of Section 11 (c) in failing to keep records in regard to its trainees.

The Court: They cannot be disassociated—those two?

Mr. Jansen: No, I don't think so; except that I might point out that while we are not making a vigorous argument in connection with that point, the language of the

Fair Labor Standards Act might seem to justify the argument that, even though the Court should find that they are not employees, they would still be required to keep records. But that really isn't the point involved in this case. In our complaint we allege that the defendant, Portland Terminal Company, trained both firemen and yard brakemen. It develops now that the Maine Central Railroad, which I believe is either the parent corporation or closely inter-related with the defendant Portland Terminal Company, actually trains the firemen. The answer of the defendant avoids any reference to the firemen, and, I suppose, for that reason. I might state to the Court that, in view of the fact that the Maine Central Railroad isn't a defendant here,—we are not litigating the question with reference to firemen—we apprehend that it will not be necessary, if the Court should decide this case favorably to the plaintiff, to bring another case against the Maine Central, because we think the issue will be decided as to firemen at the same time it is decided with regard to brakemen. In Paragraph 5 we have alleged two wage orders, and counsel has indicated that their denial of Paragraph 5 does not go to the denial of the fact that the wage orders are in fact issued. Is that correct?

MR. PIERCE: We do not deny the issuance of the orders.

THE COURT: The real issue is whether these people were employees. That's about the whole of it, isn't it?

MR. JANSEN: Yes. Mr. Thomas—

THE COURT: Do you want to call several witnesses and have them sworn at one time?

MR. JANSEN: Yes. We have several witnesses here. Some are here, and some are not here at this time.

(Fifteen individuals were then by the Clerk sworn as witnesses.)

MORTON A. THOMAS, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* Morton A. Thomas.

Q. And you are Superintendent of the Maine Central Railroad? *A.* Yes.

Q. And also Superintendent of the Portland Terminal Company? *A.* Yes.

Q. Tell us, briefly, what your duties are as Superintendent of the Maine Central and Portland Terminal, both. Give us the Maine Central first, and then the Portland Terminal Company. *A.* General supervision over the Portland Division of the Maine Central property and crews working them.

MR. JANSEN: I would like to have the record show that this witness is called by the Plaintiff as an adverse witness.

THE COURT: Very well.

Q. Now, Mr. Thomas, we are concerned particularly in this case with the operations of the Portland Terminal Company. Your supervision relates not only to the Maine Central but to the Portland Terminal Company as well. Is that right? *A.* Yes.

Q. Are you paid by the Portland Terminal Company or by the Maine Central? *A.* Maine Central.

Q. The companies are inter-related, are they? *A.* I don't know. No. They are two separate companies, as far as I know.

Q. I mean there is a close relationship, at least, between the two companies? *A.* Yes.

Q. And the Portland Terminal Company performs terminal facilities here in Portland for the Maine Central? *A.* Yes.

Q. And the Boston & Maine Railroad? A. Yes.

Q. And interchanges cars with the Grand Trunk line? A. Yes.

Q. Is that the Canadian National? A. Yes.

Q. When a train of either the Boston & Maine or the Maine Central enters into the terminal, that comes within the jurisdiction, or under the jurisdiction, of the Terminal Company? They switch the cars? A. Yes.

Q. They service the engines? A. Yes.

Q. Do they add any new cars or take off passenger cars from the train and break down and make up freight trains for both railroads? A. Yes.

Q. They also deliver freight cars to various points in and around Portland, within the terminal? A. Yes.

[Thereupon document was marked as Plaintiff's Exhibit No. 1.]

Q. I show you Plaintiff's 1, and I will ask you whether or not that is a map or the facilities of the Portland Terminal Company? A. Yes.

Q. And indicated on the map are a number of parts of it that have been stricken out in pencil. Those facilities are no longer in service? For instance, at Thompson's Point there is a yard indicated, and that is stricken out in pencil. That is no longer in service? A. Yes. That is right.

Q. And this bridge, just north of South Portland—across Fore River? That bridge is no longer in service? A. That bridge is no longer in service. No.

Q. And Wharf Number Five is no longer in service? A. No.

Q. And this part of the facilities indicated across from the State Pier, near the Portland breakwater light—that is no longer in service? A. No.

Q. And the interchange—that is indicated up near the Portland Junction between Grank Trunk and the Portland

Terminal Company; that is no longer in service? *A.* That is right.

Q. Anything else here that isn't in service that I haven't pointed out?

THE COURT: Is that particularly important?

MR. JANSEN: Not particularly; but I think we ought to include it.

A. I don't know that there is.

Q. This map represents the facilities of the Portland Terminal Company, with the exception of some facilities outside the City of Portland, at Westbrook and Cumberland Mills or some other place? *A.* Yes. There are such places.

MR. JANSEN: We offer Plaintiff's Exhibit 1.

MR. PIERCE: No objection. I want this record to show this, in regard to the statement of Mr. Jansen about an adverse witness. The witness is employed by the Company,—

THE COURT: I understand. Not necessarily adverse. He is employed by the railroad. Counsel assumes he is adverse. His assumption doesn't bind the Court.

MR. JANSEN: If there is any question about it, this man is the Superintendent . . .

THE COURT: The question is whether he is adverse. You said he was an adverse witness. That is a designation that is wholly your own. Go ahead.

MR. PIERCE: I think it might indicate that Mr. Thomas' testimony isn't the truth—that Mr. Thomas isn't telling the truth.

THE COURT: I assume everybody will tell the truth. Go ahead.

Q. Now, to save time, Mr. Thomas, the Terminal has stations at Portland Union Station, Deering Junction,

Cumberland Mills, Westbrook and Woodfords? *A.* No station at Woodfords.

Q. No station at Woodfords? *A.* No.

Q. But they have stations at those other points I have named? *A.* I think so. I can't remember all you named.

Q. Union Station, Deering Junction, Cumberland Mills and Westbrook? *A.* Yes.

Q. Your Yard offices are located at Rigby Yard No. 7, 8 and 1? *A.* Yes.

Q. Yard No. 1 is the freight-house? *A.* Yes.

Q. And the board which lists the employees and their assignments is kept at Rigby? *A.* Yes.

Q. The Terminal Company operates over practically 126 yards of tracks, with 107 main line switches and 608 side track switches. Do you know that to be a fact? *A.* No, I couldn't tell you about that.

Q. Do you know how many combined engineers and trainmen you employ generally—usually? Would you say about 150 to 175? *A.* Which?

Q. Engineers and trainmen combined?

MR. PIERCE: You are now talking about the Portland Terminal Company?

MR. JANSEN: Yes, Portland Terminal Company. *A.* Well, as far as the trainmen are concerned, they run up over 100.

MR. JANSEN: Perhaps I can save time.

[Conference, off the record.]

MR. PIERCE: All right.

MR. JANSEN: It is agreed that the record may show that the number of miles of track operated are 126; switches in the Terminal area 107 of the main line and 608 side track; number of trains served daily, or serviced daily, approximately 93 in and out; number of locomotives owned by the

Portland Terminal Company, 23; number of locomotives handled by them are 65 a day, approximately. Then they have employees in the following groups: Roundhouse employees, mechanics and helpers, approximately 203; laborers approximately 75; yard crews, engineers and trainmen, approximately 174; station and yard employees other than engineers and trainmen, approximately 438; and all other employees, including maintenance-of-way employees, approximately 373.

Q. Now, Mr. Thomas, trainmen are divided into two classifications—engineers and ground crews, in the case of the Portland Terminal Company? *A.* No.

Q. How would you divide them? *A.* I don't understand you. You said "trainmen are divided"?

Q. Yes. *A.* Trainmen have nothing to do with engineers.

Q. Then you have engineers *and* trainmen? *A.* In the Portland Terminal Company?

Q. Yes? *A.* Yes.

Q. Operating the train? *A.* Operating the switchers.

Q. Well, the engineers operate the engines? *A.* Yes.

Q. They are the engineers and firemen? *A.* Yes.

Q. And the trainmen are the conductor and the yard brakemen? *A.* Yes.

Q. You also refer to them as foremen and helpers? *A.* In some parts of the country. Yes.

Q. The yard brakemen are in some places referred to as the switchmen? *A.* I think that is right.

Q. And these men, if they are on a regular shift, report to the same yard office each day? *A.* Same location. Yes, sir.

Q. If they happen to be on the spare board they report wherever they are told to report? *A.* Yes, sir.

Mr. Pierce: You are now discussing trainmen?

MR. JANSEN: Yes.

MR. PIERCE: You understood that is what he is asking about, Mr. Thomas? *A.* Yes. Trainmen.

Q. Now, the Portland Terminal Company has for many years been engaged in the practice of training yard brakemen. Is that right? *A.* So far as I know. Yes, sir.

Q. How long have you been with the Portland Terminal Company? *A.* Nearly two years.

Q. And before that time what railroad were you with? *A.* With the Boston & Maine.

Q. Boston & Maine? *A.* St. John & L.C., and M. & W. Railroad.

MR. PIERCE: Just give the full names, if you will Mr. Thomas. *A.* St. Johnsbury & Lake Champlain Railroad—

Q. You are not very familiar with the practice of the Portland Terminal Company prior to the time you came with them? *A.* No.

Q. How long has Mr. Quincy been with the Company? *A.* I can't tell you. Quite a long while.

Q. Longer than you? *A.* Yes, sir.

Q. At the present time the Company is operating under some kind of an agreement with the Brotherhood of Railroad Trainmen, with regard to trainees? *A.* A supplement to their agreement. Yes, sir.

Q. Are you familiar with the agreement and the terms of the agreement betwen the Railroad and the Brotherhood; and the forms that are used by the Railroad in connection with trainees? *A.* Yes, sir. I think so.

THE COURT: By "Railroad" you mean the Terminal Company?

MR. JANSEN: Yes. The Terminal Company is all we are talking about in this case.

Q. When a man applies for a job with the Portland

Terminal Company, as a yard brakeman, he is given an eye test and a physical examination first? *A.* Yes.

THE COURT: And a what? Given a what?

MR. JANSEN: Given an eye test and a physical examination.

Q. If he passes his eye test and the physical examination, he is then assigned to a particular conductor for training? *A.* Well, of course, there is more goes with that than you have spoken of.

Q. What? *A.* A talk or conversation with the applicant before he is—before he has taken the eye test or the physical examination.

Q. You have some conversation with him, and have him sign some other papers, too, don't you? *A.* Yes. Sign his application.

[Thereupon document was marked as Plaintiff's Exhibit Number 2.]

[Further documents were produced at this time and marked as Plaintiff's Exhibits 3 and 4.].

Q. I show you Plaintiff's Exhibit 2; that is the first thing that an applicant is asked to sign, it it not? *A.* No.

Q. Which of these blanks 2, 3 and 4, is the applicant asked to sign first? *A.* Neither.

Q. You have something else that he has to sign? *A.* Yes.

Q. What is it? *A.* The eye and ear test examination.

Q. Is that on here as part of Exhibit 2? *A.* No. We don't use that *(indicating)*.

Q. You don't use that? *A.* No.

Q. Do you have one of the forms for the eye and ear test or examination with you? *A.* No.

Q. That is just with reference to the time when he goes to have his eye test? Questions are asked and he signs to indicate that he has the test? *A.* Indicates that he had,

and it is explained to him if there is no defect in his vision, etc.

Q. And the same thing is true of the physical examination? He has to answer certain questions the doctor asks him, and sign the form? *A.* Yes.

Q. And the next thing he signs is Plaintiff's Exhibit 2? *A.* Yes.

Q. And that is a form that has on the top of it "Boston & Maine Railroad", but you use that form in connection with the Portland Terminal Company? *A.* Yes.

Q. And I suppose wherever the "Boston & Maine" appears in the form you strike that out and put in "Portland Terminal Company"? *A.* That is correct.

Q. At the end of the form is a form of release. Is that executed by the applicant at the same time? *A.* Yes, sir.

Q. And there, again, you strike out the name "Boston & Maine" and insert "Portland Terminal Company"? *A.* That is right.

Q. Then, at the same time, the applicant signs Plaintiff's Exhibit Number 3, does he not? *A.* Yes. That is Exhibit 3; Form Number 1.

Q. And on this Exhibit 3 I will call your attention to the words "without compensation" which have been stricken out. Prior to October 1, 1943, those words were in the form when it was signed by the applicant? *A.* Yes, sir.

Q. *Now* these words are stricken out and the same form is used. Is that right? *A.* Yes.

Mr. Jensen: I offer Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3.

Mr. Pierce: No objection.

The Court: Admitted.

Q. Now, after those forms have been signed by the applicant, you then give him a form similar to Plaintiff's Ex-

hibit 4, which I am now showing you. Isn't that right? *A.* Well, that is after the physical examination and all those things. Is that what you mean?

Q. Yes. *A.* Yes.

Q. This Form—Plaintiff's Exhibit 4—that I am showing you, is in blank, but it is addressed, when it is given to an applicant, to a specific conductor, like Mr. Gleason or Mr. Pettix or O'Neil or one of your conductors? *A.* Yes.

Q. And it is dated, and the name of the applicant is filled in? *A.* Yes.

Q. And do you sign it as Superintendent? *A.* No, I don't.

Q. Someone signs it for you? *A.* Yes. Someone signs it for me.

Q. And that form—Plaintiff's Exhibit No. 4—is in use now? *A.* Yes.

Q. And, as far as you know, was in use prior to October 1, 1943? *A.* As far as I know.

MR. JANSEN: We offer 4.

MR. PIERCE: No objection.

THE COURT: Admitted.

Q. Who pays for the eye test and the physical examination? *A.* There is no charge for the eye test. That is given by our Examiner. And the aplicant pays for the physical examination.

Q. Two dollars, is it? *A.* I don't know.

Q. Can he go to any doctor that he may choose for the physical examination, or is he sent to the Company doctor? *A.* He is sent to the Company doctor.

Q. And he pays the Company doctor when he takes the examination? *A.* Yes.

[Thereupon documents were marked as Plaintiff's Exhibits 5 and 6.]

Q. Calling your attention, Mr. Thomas, to Plaintiff's Exhibit 5; you had better read that carefully.

[Witness examines document in question.]

Q. (*continued*): I will ask you whether or not that is the form that is used by your company, and has been in use for a number of years, and is signed by the conductor and returned to either your office, or to the Assistant Superintendent's office, after the trainee has completed his training? I might say, Mr. Thomas, that that is a copy that we wrote out, and therefore it may not look familiar to you? *A.* I don't know whether that form is used or not—in all cases.

Q. Calling your attention to Plaintiff's 6, I will ask you to examine that carefully and tell us whether or not that is used by, and has been used by, the Portland Terminal Company? *A.* Yes, sir.

Q. And what does Plaintiff's 6 represent? *A.* Report of the Reviewing Board of the application of certain men.

Q. And who is the Reviewing Board? *A.* At this time it is the Superintendent and two trainmasters. [*Indicating paper*].

Q. At that— Is that a report that is made out in connection with the examination for flagman, that the employee takes—or is that a report that is made after he has completed his training? *A.* After he has completed his training.

Mr. Jansen: I will offer Plaintiff's Exhibits 5 and 6, if you have no objection.

Mr. Pierce: Well, you were having kind of a heart-to-heart talk with Mr. Thomas. I couldn't hear what he said about 6.

[Conference, off the record, and testimony read.]

Mr. Pierce: No objection.

THE COURT: Admitted.

Q. Now, Mr. Thomas, before October 1, 1943, the time spent by the applicant during what you would call a training period wasn't paid for at all by the Portland Terminal Company. Is that right? *A.* That is right.

Q. And since October 1, 1943, if the applicant completes his training period and goes on the board, you pay him four dollars a day for the time spent in training? *A.* Yes.

Q. If he doesn't complete the training period you pay him nothing, regardless of how many days' time he may spend. Is that right? *A.* That is right.

THE COURT: Suppose he completes his training period, but is not employed?

Q. How about that, Mr. Thomas?

THE COURT: Does the man who completes his training period . . . *A.* Necessarily he goes on the board and goes to work as an employee.

THE COURT: What do you mean by "board"? *A.* It is the board where we carry the names of all spare men.

THE COURT: It is a list of spare men? *A.* Yes.

THE COURT: Does he necessarily go to work immediately? *A.* He goes on the board.

THE COURT: Do you call that "going to work"? *A.* Yes. When he goes on the board he becomes an employee.

THE COURT: He is paid then? *A.* Not until he catches a job.

MR. PIERCE: What happens if he is accepted and put on the board and there doesn't happen to be an available train for him? What happens about that four dollars? *A.* He can collect if he goes on the board.

MR. PIERCE: Whether he is actually assigned to a train or not? *A.* Yes.

THE COURT: Does he go on the board automatically when he completes his period of training? *A.* And is OKed by the conductor. Yes, sir.

THE COURT: Does anyone complete their training and not go on the board? *A.* Not that I know of. No, sir.

Q. In other words, when an applicant receives this written OK, such as is indicated by Plaintiff's Exhibit 5, and goes on the board, then you pay him four dollars retroactive for the time spent in training? *A.* He can get his money any time after he has gone on the board.

Q. And I assume when you pay him the four dollars you deduct the railroad retirement tax? *A.* I don't know.

Q. Who would know that? *A.* The Chief Timekeeper.

Q. Is he here. *A.* I haven't seen him.

Q. Would Mr. Strout or Mr. Quincy know that? *A.* No, I don't think so.

Q. He doesn't take any other examination, other than the eye test and his physical examination, and spend this time in training and get the approval of the conductor before he goes on the board and is paid the same as anybody else when he gets a job—that is, when he gets a run? *A.* No. There is no other examination.

Q. No other examination at all? *A.* No.

Q. No examination with regard to the rules? *A.* No.

Q. Or any examination with regard to the lay-out of the Yard—the switches and blocks? *A.* No, sir.

Q. Do you discuss the application and do you talk to each applicant? *A.* Do I?

Q. Yes? *A.* No, sir.

Q. You don't have any talk with them at all? *A.* No.

Q. So whatever is said to the applicant is hearsay, so far as you are concerned? *A.* Yes.

Q. Are you familiar with the agreement that was entered

into with the Brotherhood of Railroad Trainmen in October of 1943? *A.* Yes.

Q. That was an agreement entered into because of the war emergency; is that right? *A.* Because of the inability to get sufficient men.

Q. You were having trouble at that time getting men? *A.* Yes, we were short of men.

Q. So for the duration of the war, at least, you entered into this agreement with the Brotherhood of Railroad Trainmen? *A.* With the hope that it would induce some men to become employees.

Q. And this agreement is designed to last for the duration of the present emergency? *A.* Yes, sir.

Q. And after the emergency, I assume, you will go back to your old practice? *A.* Well, I don't know a thing about that.

Q. So far as this agreement is concerned, you will? *A.* That is right.

[Document marked Plaintiff's Exhibit No. 7.]

Q. I show you Plaintiff's Exhibit 7, and ask you whether or not that is the agreement between the Portland Terminal Company and the Brotherhood of Railroad Trainment, effective October 1st, 1943? *(Witness examines paper.)* *A.* It doesn't seem as though that reads just the same as the agreement does,—but I am not sure.

Q. I got that from Mr. Miller, your attorney. *A.* It seems as though this wording right here *(indicating)* is different.

[Conference between counsel, off the record.]

MR. PIERCE: Well, Mr. Jansen, if you will show us that agreement we will tell you whether it is correct or not, and not bother the witness.

MR. JANSEN: All right. I will be glad to.

[Counsel examines exhibit.]

MR. PIERCE: We will admit that Plaintiff's Exhibit 7 is an accurate copy of a letter written by Mr. M. F. Rolfe, Assistant to the General Manager, to Mr. W. E. Easler, General Chairman of the Brotherhood, and acknowledged by Mr. Easler.

MR. JANSEN: We offer Plaintiff's Exhibit 7 in evidence.

THE COURT: Admitted.

Q. Now, Mr. Thomas, in connection with this training of these applicants for the job of yard brakeman, are any instructions given to the conductors, other than this letter that is sent to the conductor along with the applicant? A. No special instructions. No.

Q. Do you have any general written instructions, or any general instructions to conductors, written or verbal, with regard to this training of these applicants? A. No.

Q. Do you have any rules—written rules or verbal rules—that are given to the conductors or any other of the regular trainmen, with regard to the training of these applicants, other than is contained in these documents that have been received in evidence? A. Not that I know of.

Q. Now, Mr. Thomas, how many compose a crew of trainmen in the Portland Terminal Company? A. By that you mean the ground crew?

Q. Yes? A. Conductor and two brakemen.

Q. Conductor and two brakemen? A. Yes.

Q. And I assume that ordinarily, when an applicant such as we have been talking about is sent out to the conductor, he is an extra man on the crew? A. Yes.

Q. Are there any occasions when he is required to serve as a member of the crew? A. None that I now of.

Q. None that you know of? A. None that I know of. No, sir.

Q. Do you keep any records with regard to these trainees or strikers—any records at all? *A.* What sort of records?

Q. Do you keep records as to the hours worked, for example? *A.* No.

Q. Do you keep a record of their name and address? *A.* Well, that is on the application.

Q. Other than the application, and the record that you eventually get from the conductor as to the number of days and the dates that trainee worked, you keep no other records of these trainees. Is that right? *A.* That is right.

Q. And, if they don't complete the training period, you destroy the records, practically immediately? *A.* No, I wouldn't say that. I don't think the records are destroyed.

[Document marked Plaintiff's Exhibit No. 8.]

Q. Mr. Thomas, I show you Plaintiff's Exhibit 8, and I will ask you whether or not that is a list of all the men who have trained with the Portland Terminal Company, that has been furnished us by the Company—men who have trained since January 1, 1942, to March 20, 1945? *A.* I don't know.

Q. Oh, you haven't seen this before? *A.* No.

Q. I see. Do you know who made up this list? *A.* No. I don't.

[Conference, off the record.]

MR. PIERCE: We will admit that that is what it says it is.

MR. JANSEN: Plaintiff's Exhibit No. 8 is offered in evidence.

MR. PIERCE: It is admitted that it is what is purports to be, according to the heading at the top.

THE COURT: Admitted, with that understanding.

MR. PIERCE: It is admitted that the document, as admitted, includes the pencilled notations on the margin.

THE COURT: Very well.

[Thereupon documents were marked Plaintiff's Exhibits 9 and 10.]

Q. I show you . . . Well, just a minute.

[Conference, off the record.].

Mr. Jansen: Plaintiff's 9 and 10 were lists which were furnished to us by the Defendant.

Mr. Pierce: It is admitted, as to both 9 and 10, that they may be admitted and that they are correct in accordance with the headings at the top of each.

Mr. Jansen: They are offered, may it please the Court.

The Court: Admitted.

Q. Now, Mr. Thomas, are you familiar with the records of the Company? With regard to men who have trained and haven't completed the training? *A.* Not particularly. No.

Q. You don't have any way of knowing whether Plaintiff's Exhibit 10, which you have before you, is a complete list of all the men who have trained and have not yet completed the training; or not? *A.* No, sir. I don't.

Q. Do you recall there was some discussion, in which you took part, with reference to a man by the name of Richard Anderson? *A.* Discussion when, and where?

Q. Back in October or November; with regard to Anderson, who worked as trainee for one day? *A.* I remember the case. Yes.

Q. He did actually work as trainee for one day, didn't he? Or was actually in training for one day? *A.* I think so. I am not sure just what the record is.

Q. Will you look and see if he is on that list? *A.* No, I don't see his name on the list.

Q. You don't keep the hours each work-day or each work-week, of the men in training—in the records of the company—do you? *A.* No, sir.

Q. You don't make any entries in the records with refer-

ence to their pay while they are in training. Is that right? *A.* What records?

Q. The records of the Company? *A.* Yes. I expect the records would show if the men had been paid.

Q. And would that show that he has been paid four dollars a day for the days that he is in training? *A.* I would expect that would be what it would show, as they would be kept in the Paymaster's office.

Q. And the man who doesn't complete his training, there would be no reference to pay whatsoever. Is that right? *A.* I think that is correct. Yes, sir.

Q. The trainee stays with the same conductor during his entire training period, doesn't he? *A.* Not necessarily. No.

Q. He is assigned to a given conductor? *A.* Yes.

Q. And ordinarily he stays with the same conductor? *A.* Ordinarily, I would say yes.

Q. You don't keep any records of the trainees with reference to the work-week during their training period? *A.* No.

Q. It is the record of the actual days work that is turned in by the conductor in that manner that you pay him at four dollars a day? *A.* Yes.

Q. And before October, 1943, you paid him nothing; so you had no record of any pay being paid to him. Is that right? *A.* Yes.

Q. Who did you tell us could tell us about deductions made on account of railroad retirement deductions? *A.* Mr. Parker.

Mr. Jansen: That is all, Mr. Thomas.

Cross Examination.

X-Q. (by Mr. Miller): Mr. Thomas, does an applicant for a Portland Terminal Company job see any particular man in the first instance? *A.* Yes. He either sees Trainmaster Strout or Mr. Johnson, who is Chief Clerk for Mr. Quincy.

X-Q. Where is Trainmaster Strout's office located? A. In the General Office building.

X-Q. 222 St. John Street? A. Yes.

X-Q. And is Mr. Strout a Portland Terminal Company official? A. No, sir. Maine Central.

X-Q. How does it occur that an applicant for a Portland Terminal Company job sees Mr. Strout? A. Well, it is for convenience to the applicant. If he had to go to Rigby to see Mr. Johnson first, and then come back to the city for his physical examination, it makes two or three trips which are apparently unneccessary; so we arrange for Mr. Strout to handle the preliminary end of it.

X-Q. And after leaving Mr. Strout's office, where does the applicant go? A. To the doctor. And from there to Rigby yard office.

X-Q. And to whom does he report at Rigby? A. To Mr. Johnson, who is Mr. Quincy's Chief Clerk.

X-Q. And what is Mr. Quincy's position, or title? A. Assistant Superintendent of the Portland Terminal Company.

X-Q. Whether or not it is true that some applicants, in the first instance, see Mr. Johnson? A. Yes, that is true.

X-Q. And to do that they have to go to the Rigby yards? A. Yes, sir.

THE COURT: How far away is that? A. Two and a half miles, or three miles.

X-Q. I show you this paper, and ask you if that is the application blank which Mr. Jansen showed to you? A. Mr. Jansen? Is that this gentleman here?

X-Q. Yes. A. Yes. That is either the same blank or a copy of it.

MR. MILLER: May the record show that that is Plaintiff's 2?

X-Q. I show you Plaintiff's Exhibit No. 2, and ask you

to read the first lines of the second paragraph. *A.* (*reading*): "Application for: Student privileges in . . . Employment in . . . Re-examination for . . . Promotion to . . ."

X-Q. So that application, Plaintiff's Exhibit 2, refers to four different alternative positions. Is that correct? *A.* That is right.

X-Q. Whether or not, in making out the application, some of them are crossed out? *A.* Yes, sir. The ones that don't apply.

X-Q. And in the case of an applicant for a Portland Terminal Company position who has had no previous experience, which items are crossed out? *A.* All but the first.

X-Q. Will you read the first, please? A. (*reading*): "Student privileges in . . .".

X-Q. Will you describe in general, Mr. Thomas, what the nature of the instruction given to a trainee is?

MR. JANSEN: Just a moment. Witness has already testified that whatever is said is hearsay, so far as he is concerned.

MR. MILLER: I think that was with reference to the conversation between either Mr. John and the applicant or Mr. Strout and the applicant; but I'll put the question another way.

X-Q. From your experience, Mr. Thomas, are you aware of the nature of instructions given to trainees on the Portland Terminal Company property? *A.* Yes.

X-Q. Will you tell the Court, in general, what sort of instruction that is?

MR. JANSEN: I object to that.

THE COURT: Those are the instructions you require to be given? *A.* Yes.

THE COURT: He may answer.

A. He is instructed how to handle switches, how to man-

ipulate hand-brakes, hitch hose, give hand and lantern signals; and he is especially instructed on how to do the job safely for his own sake.

X-Q. On the average, how long does it take before a trainee completes his course of instruction? *A.* I should think the average would be somewhere in the vicinity of seven or eight days.

THE COURT: What does the time depend on? *A.* The time depends on the individual, to a large extent.

THE COURT: On his aptitude? *A.* Yes. And also, of course, some fellows have been around the railroad considerably and know quite a little about it before they start.

X-Q. Does the trainee only observe, or does he also do some acts? *A.* Oh, he does some acts.

X-Q. And, in doing those acts, does he take the place of a regular member of the crew? *A.* No, sir.

X-Q. Whether or not the regular crew is in full strength at all times? *A.* Yes, sir.

X-Q. And, in your opinion, does the presence of the trainee aid the crew? *A.* No. I would say it was a detriment to the crew.

X-Q. Why do you say that? *A.* Because they have to watch out for this fellow all the time, to see that he doesn't get hurt; and also, if they direct him to throw a switch, they have to go over with him and see that he does it correctly, and so forth; and they could do it quicker themselves than they could with him. Than they could with him along.

X-Q. Does the Portland Terminal Company have certain rules which trainees have to live up to? *A.* Well, during the training period all the trainee knows about rules is what is told him by the instructor in charge.

X-Q. Are there any penalties or discipline for infraction of rules by a trainee? *A.* Oh, no.

X-Q. Suppose a trainee appears Monday morning and spends an hour with the crew, and then leaves and comes back Tuesday. What happens? *A.* Nothing happens.

X-Q. Well, is he taken back? *A.* Yes.

MR. JANSEN: Has that ever occurred, Mr. Thomas? *A.* I think it has. Yes.

MR. JANSEN: Do you know that it has? *A.* No. I couldn't testify that I knew that it has.

MR. JANSEN: It is just . . .

THE COURT: I think, perhaps, you had better wait until it is your turn to examine him.

X-Q. If it did happen, would the answer be the same? That he would be taken? *A.* Yes.

X-Q. You told Mr. Jansen of the positions you held as railroad man. Will you recite those again, and tell us where you were stationed? *A.* I was with the Boston & Maine Railroad, from 1910 to 1938, stationed at Lyndonville, Vermont, White River Junction, Vermont, Woodsville, New Hampshire; and from 1938 to 1939 I was Superintendent of the St. Johnsbury, Lake Champlain & Montpelier and Wild River Railroad, stationed at Montpelier, Vermont.

X.Q. Did the Boston & Maine Railroad have trainees at White River? *A.* Yes.

X-Q. And Woodsville? *A.* I don't recall any at Woodsville.

X-Q. Did the St. Johnsbury & Lake Champlain have trainees at Bangor? *A.* Yes.

X-Q. And you were Superintendent of the Maine Central's Eastern Division at Bangor? *A.* Yes.

X-Q. For what years? *A.* 1939 to 1942.

X-Q. And whether or not trainees at those points on those railroads received remuneration for the time spent training? *A.* They did not.

X-Q. Did you consider those trainees employees? *A.* No.

X-Q. With reference to the present arrangement on the Portland Terminal Company, for paying four dollars a day to a man whose name goes up on the board after he has finished training,—is that intended as a permanent arrangement? *A.* No. According to the agreement it is a temporary arrangement for the duration.

Redirect Examination

Q. (by Mr. Jansen): Mr. Thomas, you said something about a man working for an hour one day and then coming back—leaving and coming back the next day. Do you know of any instance where a man has worked less than eight hours in this training period? *A.* No. I don't actually know. I have heard of those cases very often.

Q. Do you recall any specific instance where you may have heard of that of a specific employee? *A.* I can't give you dates or names. No.

Q. As a matter of fact, Mr. Thomas, your present agreement with the Brotherhood requires that they spend at least eight hours on the job, doesn't it? Eight hours per day? *A.* No. I don't think so.

Q. Let me read it to you. (*Reading*): "Effective October 1, 1943, and for the duration of the present emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight hours each day to the service." That is your agreement with the Brotherhood, isn't it? *A.* Yes.

Q. And that does require he spend at least eight hours a day, doesn't it? *A.* Yes.

Mr. Pierce: The question of what the document requires is for the Court and not the witness. He doesn't get the four dollars unless he stays there eight hours?

Q. Is that right? A. He is paid on a calendar day basis, as far as the four dollars is concerned.

Q. Prior to October 1, 1943, you required each of the trainees to spend at least two weeks regardless of how apt they were, didn't you? A. No. Not necessarily.

Q. Do you know a man by the name of Joseph Libby? A. No, sir.

Q. You don't know him? A. No, sir.

Q. Has it been your experience that the presence of trainees has retarded the work? A. That is my opinion.

Q. That is your opinion? A. Yes.

Q. You don't know from experience? Is that right? I asked you if it has been your experience? A. What do you mean by "experience"?

Q. Have you actually observed that it has retarded the work? A. Yes, I have actually observed, and it is my opinion that it does.

Q. You know, as a matter of fact, that trainees who are assigned to crews are required to stay the full eight hour shift? A. No. Not necessarily.

Q. Or, if the crew works ten or twelve or thirteen hours, as in the case of Mr. Gleason's crew, they stay the full ten hour shift? A. If they desire.

Q. And you know that they do? A. I think they do at most times. I don't say that they do all the time, because I don't know.

Q. And you know that the conductors have reprimanded trainees because they were late? A. Conductors don't do the reprimanding.

Q. I asked you if you knew that the conductors have done that? A. No.

Q. The conductor is in charge of the crew, isn't he? A. Yes.

Q. He tells them when to go to lunch? A. Yes.

Q. Do you know that the conductor has in some instances refused to let the trainee go to lunch until the rest of the crew has gone? A. No.

Q. You don't know any of these things as to how they actually operate out in the yard? A. Only from observation.

Q. Are you familiar with the newspaper advertising that the Portland Terminal Company and the Maine Central has embarked on in connection with the training of brakemen? A. No.

Q. You are not? A. No. I have seen it in the paper. Is that what you mean?

Q. Yes. A. I have seen some of them in the paper. Yes.

Mr. Jansen: May I ask counsel if he objects to the foundation . . . (Conference off the record.) I might state for the purposes of the record that we have in mind offering, and do offer—wish to offer—the issues of the Portland Evening Express for January 12th and 25th, 1944, and in particular that part of an advertisement of the Maine Central Railroad relating to yard helpers, yard trainmen for Rigby Yards. In both of these ads—an ad in each of the issues—and I asked counsel if he objected to the foundation . . .

The Court: Do you mean the authenticity?

Mr. Jansen: Yes.

The Court: He probably doesn't.

Mr. Pierce: No. I don't. I object to the advertisement of the Maine Central Railroad . . .

The Court: Of course, I don't know what you are talking about. I haven't seen it.

Mr. Pierce: Show it to the Court.

[Mr. Jansen shows book to the Court.]

MR. JANSEN: We could read into the record that part of the ad with reference to the yard helpers.

THE COURT: Well, I haven't read it. I notice it is Maine Central . . .

MR. JANSEN: The Maine Central Railroad has nothing to do with the yard men in the Rigby yard, except as they might be doing it for the Portland Terminal Company.

THE COURT: I haven't seen anything yet which brings the Maine Central Railroad in as a party, have I?

MR. JANSEN: No. The Maine Central Railroad has nothing to do with the yard trainmen in the Rigby yards. Whatever they are doing they are doing for the Portland Terminal Company.

[Conference at bench.]

MR. JANSEN: Are you making the point now that the Portland Terminal Company has nothing to do with that ad?

MR. PIERCE: I make the point that that ad purports, on its face, to be an ad of the Maine Central Railroad.

MR. JANSEN: Yes, but are you making a point that the Maine Central Railroad is the party which appears in this ad—when it appears this man is Superintendent of Maine Central and Portland Terminal Company—one hand washes the other. If I thought that was going to come up we could easily have made the Maine Central a party defendant.

MR. PIERCE: I don't know as Your Honor is interested in the discusion, but I am not making a captious objection. What the Maine Central does the Maine Central Railroad is liable for.

THE COURT: Of course it is perfectly obvious that they can't by an ad in the paper, bind another party to a contract. That is all there is to it, so far as I can see.

MR. JANSEN: On that point he is absolutely right.

THE COURT: The objection is sustained.

MR. JANSEN: That is all the questions we have. Oh! One further question.

Q. Do I understand correctly that you are the Superintendent both for the Maine Central Railroad and for the Portland Terminal Company? *A.* Yes.

Q. Do you get paid by the Maine Central? *A.* Yes.

Q. But you perform duties for the Portland Terminal Company? *A.* I am Superintendent for the Portland Terminal Company.

Q. Does the Maine Central have any yard men—yard brakemen—in the Rigby yards? *A.* No, sir.

Q. Would the Maine Central Railroad, as a corporation, —a separate entity,—have anything to do with hiring yard brakemen in the Rigby yards? That is a separate corporation—Would the Maine Central have anything to do with hiring yard brakemen in the Rigby yards? *A.* No. I told you what we do with Mr. Strout, here,—for convenience.

Q. In other words, for convenience you are the Superintendent for the Maine Central and for the Portland Terminal Company. Is that right? *A.* I don't know. You will have to go somewhere else about that.

Q. For convenience, Strout is actually Yardmaster for the Maine Central, but he hires employees for the Portland Terminal Company . . . *A.* No. Mr. Strout is Trainmaster.

Q. Well, as Trainmaster for the Maine Central he, in fact, takes applications for employees for the Portland Terminal Company? *A.* Yes. At times.

MR. JANSEN: I think that is all.

THE COURT: All through on direct now? I would like to have it done at one time.

MR. HANSEN: I am all through, Your Honor, I think.

MR. MILLER: No questions.

[Witness excused.]

JOSEPH M. LIBBY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* Joseph M. Libby.

Q. How old are you? *A.* Thirty-two.

Q. Where do you live? *A.* South Portland, Maine. Thornton Heights.

Q. What is your present occupation? *A.* Yard brakeman and conductor.

Q. For whom do you work as yard brakeman and conductor? *A.* Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Since April, 1937. Trackman and brakeman combined.

Q. You were employed by the Portland Terminal Company before you were employed as a yard brakeman? *A.* Yes.

Q. And how were you employed, before you were a yard brakeman? *A.* As a trackman.

Q. Maintenance-of-way employee? *A.* Yes.

Q. When did you start with the Portland Terminal Company as maintenance-of-way employee? *A.* My rating started April 15th, 1937, but I served before that. You had to accumulate six months in order to have your rating, so I was with them before that.

Q. You mean that before April of 193. you worked with them six months? *A.* Off and on. Yes.

Q. Off and on? *A.* Yes.

Q. When you were maintenance-of-way employee did you start getting paid by the Portland Terminal Company the minute you went down there and started work? *A.* Yes.

Q. When did you start braking? *A.* My rate started July 31, 1941. . . .

Q. When did you actually start in the yard braking? *A.* The following morning.

Q. July 31st . . . It would be August 1st. On the first job? *A.* Yes. The following morning. August 1st.

Q. August 1st, 1941? *A.* Yes.

Q. Now did you go right from maintenance-of-way work to braking? *A.* One day in between elapsed.

Q. And did you have to resign, or anything like that, from your maintenance of-way job? *A.* Yes.

Q. What did you do? Resign? *A.* Yes.

Q. And, after you resigned, you went on braking? *A.* Yes.

Q. And that was August 1st, 19 . . . *A.* That was . . . No. I had to put in two weeks striking.

Q. When you speak of your rating period you are talking about the time after your striking or training period? *A.* Yes.

THE COURT: When you speak of striking . . . *A.* I had to put in two weeks with the crew, striking. Learning the work.

THE COURT: You don't mean quit the job—striking on the job? *A.* No. It is a training period.

Q. They call them strikers or trainees? *A.* Yes.

Q. Well, when did you actually resign as maintenance-of-way man? Before your striking, or after? *A.* Before I did my striking.

Q. And then who did you talk to about going on as yard brakeman? *A.* I went out and saw Mr. Quincy.

Q. And what did Mr. Quincy tell you about it? *A.* Well, I heard . . .

Mr. Pierce: Just a minute. He asked you what Mr. Quincy told you. *A.* Mr. Quincy told me that he would hire me.

Q. Did he say anything about this training period? *A.* Yes.

Q. What did he say about that? *A.* That I had to train for two weeks.

Q. For two weeks? *A.* Yes.

Q. You had been working in the yards around there for four years? *A.* Five. That is, as section hand.

Q. You are pretty familiar with the yards? *A.* Most of them. Yes.

Q. Tracks and switches, and all of those things? *A.* In a majority of the yards. Yes.

Q. Then did they require you to take an eye test and a physical examination? *A.* Yes.

Q. And you did that? *A.* Yes.

Q. And did you sign these application forms we have been talking about? *A.* Yes.

Q. Then did they give you some kind of a form to report to a certain conductor? *A.* That's right.

Q. Do you remember who the conductor was? *A.* Mr. Pettis.

Q. Is he in the court-room? *A.* Yes.

Q. And you went out and reported to Mr. Pettis? *A.* Yes.

Q. After you reported to Mr. Pettis, what did he tell you to do? Tell us what Mr. Pettis told you to do. Did he tell you to stay with him, or go with someone else; or what? *A.* I don't know the exact words that took place, now. I was to be a trainee with the crew and learn the work, and he instructed me in safety and instructed me to stay with the head brakeman and learn the motions and the yard and the work in general.

Q. What time of day did you start? A. Six-thirty a.m.

Q. How long did you work during the day? A. Eight hours.

Q. And did you work each day during the two weeks? A. All but Sunday.

Q. You didn't work Sunday? A. The crew didn't work Sunday.

Q. What crew was that? A. Street job. Commercial Street job.

Q. You worked each day from six-thirty in the morning until when? A. Two-thirty in the afternoon.

Q. And you worked each of the days during the entire fourteen day period, except Sundays? A. Yes.

Q. Did you go home early any day? A. No.

Q. Did you put in the full eight hours every day? A. Yes.

Q. Did you have any talks . . .

THE COURT: What was the answer to that last question? A. Yes.

THE COURT: Speak up.

Q. You put in the full eight hours every day? A. Yes.

Q. Did you have any talks with the conductor during this striking period about going up to the head office before the fourteen days were up? A. What do you mean? I don't understand.

Q. Did the conductor send you up, with his signature, saying that you were OK, before the fourteen day period was up? A. Yes.

Q. Do you remember when that was? A. No.

Q. Was it at the end of a week, or ten days? Do you know approximately? Well, what happened? A. Well, I was told to finish out the fourteen days.

Q. Do you remember the kind of a form you had? Let me show you Plaintiff's Exhibit No. 5. I will ask you if that

is the kind of a form that you got from the conductor—from Pettis—when he told you to go up to Mr. Quincy's office? Did it look something like that *(indicating)*? *A.* Well, I believe—I don't know whether that is the same form or not, but it contains the same meaning, I think.

Q. And he sent you up to Quincy's office? *A.* Yes, I went up to Quincy.

Q. And he had signed this form similar to Plaintiff's 5? *A.* I believe so.

Q. And they sent you back, and told you that you had to finish out the fourteen days? *A.* Yes.

Q. Did you get any pay at all for the two weeks that you spent striking? *A.* No.

Q. What did you do the first day that you were on there, during this training period? Describe that to us. *A.* Of course I knew the crew very well, and I tried to help them do their work and regular duties as much as I could.

Q. Did you start right in the first day? *A.* Yes.

Q. What part of the train did you ride? *A.* I stayed with the head brakeman.

Q. And he stays . . . *A.* He stays near the engine. What we call "chases the engine."

Q. He is the man who you say chases the engine? *A.* Yes.

Q. And you stayed right with him during that entire training period? *A.* Yes.

Q. Now the first day that you were there, did you couple or uncouple any cars? *A.* Oh, yes; I did a lot of things.

Q. Did you throw any switches? *A.* Yes.

Q. Connect up steam hoses or air hoses . . . *A.* No. We didn't do it on that job.

Q. Why? *A.* We don't use the air much on the Street. I was showed how to do it, but we didn't have to do it.

Q. Did you do any signalling? *A.* Well, I did what I was shown.

Q. The first day you say you pitched right in? *A.* Yes. I was willing and I wanted to learn.

Q. And you did that right along through the entire fourteen-day period? *A.* Yes.

MR. PIERCE: Do you claim this is an adverse witness, or is this your witness?

THE COURT: Well, I am not so particular, perhaps, as some about leading questions. But it isn't so forceful or impressive with counsel testifying instead of the witness, of course. I have to take that into account.

MR. JANSEN: I'm sorry.

THE COURT: I don't care. It simply diminishes the weight of the evidence.

Q. Will you tell us what you did about riding or walking? Did you have to do any walking on the job? *A.* Oh, yes; you do a lot of walking.

Q. Where did you walk? You will have to describe that to us. *A.* You are on your feet most of the time, walking. Very, very little riding. Switching out the cars, and backing up and going ahead, and switching on a lead and walking around the yard.

Q. Will you describe whether there was any difference between the work . . . Was there any difference between the work you did during the striking period and the work you did as brakeman after the striking period was over? *A.* Well, it is the same kind of work. Of course, I was learning all the time; at the first of it.

Q. Can you tell us whether or not you did all of the various kinds of work while you were striking that you had to do later as a brakeman? *A.* I tried to do all of them that were required on that job.

Q. State whether or not, even after you went on the regular pay-roll, you continued to pick up a little learning

here and there? *A.* Oh, yes. You can always learn something.

Q. Do you have to take any kind of an examination with regard to the rules of the yard—signals or blocks or anything? *A.* I had to write the flagman's work out when I got through my training period.

Q. How did you do that? *A.* I went out to Rigby and he gave me the book, and I had to copy the answers—the questions were all typewritten out, and I had to copy the answers in out of the regular rule-book.

Q. Let's see. They gave you a book which contained the questions? *A.* Yes.

Q. And it was a matter of copying the answers? *A.* Yes.

Q. Did you have to learn anything from memory, for that examination? *A.* No, you don't have to learn anything.

Q. After the fourteen-day period was up, you went on the spare board—on the regular pay-roll? *A.* On the spare board. That is right.

Q. How was the weather when you were striking? *A.* Well, it was summertime. Hot. We had one rainy day.

Q. What did you do that day? *A.* I stayed right on the job.

Q. Did you ever quit early? *A.* No.

Q. Were you ever told that you could go home early? *A.* No.

Q. Did you ever . . . Were you ever told that you could come and go as you pleased while you were striking? *A.* No. No mention was made of coming or going.

Q. You stayed there from six-thirty to two-thirty? *A.* Yes.

Q. And, as far as you know, you were expected to? *A.* That is right.

Cross-Examination

X-Q. (Mr. Pierce): Where do you live? *A.* Thornton Heights, South Portland.

X-Q. Where did you come from, to South Portland? *A.* Scarboro.

X-Q. Did you go to school? *A.* Yes.

X-Q. Where did you go to school? *A.* Scarboro.

X-Q. Scarboro High School? *A.* Yes.

X-Q. And Scarboro High School, I suppose, used to start at a certain time in the morning? *A.* Yes.

X-Q. And let out at a certain time in the afternoon? *A.* Yes.

X-Q. And when you were there you showed up at that time and left at that time? *A.* I was four years in high school and never was absent, tardy or dismissed.

X-Q. And the teacher didn't let you go home early now and then? *A.* I didn't ask to.

X-Q. And when you were training to become a yard brakeman you showed up when the crew were starting in the morning? *A.* Yes.

X-Q. And you stayed there as long as the crew worked? *A.* Yes.

X-Q. Despite the fact that you had previously worked as track man? *A.* Yes.

X-Q. You hadn't learned all the work that was to be learned about the railroad business? *A.* No, you can always learn something every day.

X-Q. This was three years ago last summer? *A.* It will be four years this coming July.

X-Q. Do you recall the day when you were given by Mr. Pettis a card or letter telling you that you were qualified to go to work? Do you recall the date? *A.* No, I don't. It was during the fourteen-day period.

X-Q. Do you know how long it was prior to the end of the period? *A.* No, I don't.

X-Q. You don't know whether it was twelve or ten or seven days that were up? *A.* No, I don't.

X-Q. Do you know who you saw, down at the Yardmaster's office? *A.* It was a man that Mr. Johnson took his place. Maybe Mr. Johnson could tell you. That man isn't there now. I didn't talk with Mr. Quincy.

X-Q. The moment you completed your two weeks you went right on the board, you say? *A.* Yes. That same day.

X-Q. And the very next day you were assigned to actual work? *A.* Yes.

X-Q. So that apparently they were in need of men, or, at least they had use for men? *A.* Yes.

X-Q. When you were on the crew, were there any less men on the crew by reason of your being there? *A.* During my training period, do you mean?

X-Q. Yes? *A.* No.

X-Q. They were all out there? *A.* Yes.

X-Q. And they stayed the full period? *A.* Yes.

X-Q. Were they competent men? *A.* Oh, yes.

X-Q. They were competent to run the train if you hadn't been there, weren't they? *A.* Yes.

MR. PIERCE: That is all, Mr. Libby.

MR. JANSEN: Nothing further.

THE COURT: He may be excused.

[Witness excused.]

THE COURT: We will take a recess for ten minutes, here.

[Recess was then taken from 11:45 a.m. to 12:00 noon.]

AFTER RECESS

MR. JANSEN: I will call Mr. Carle.

KEITH R. CARLE, having been duly sworn, was examined and testified as follows:—

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name? *A.* Keith R. Carle.

Q. Where do you live? *A.* 22 Norwood Street, Portland.

Q. How old are you? *A.* Forty years.

Q. How are you employed? *A.* Carpenter.

Q. Is that your trade? *A.* Yes, sir.

Q. Have you been with the Portland Terminal Company? Have you ever been with the Portland Terminal Company? *A.* Yes.

Q. Do you recall when that was? *A.* I can't tell you the exact date. No.

Q. Do you recall what month it was? *A.* I believe it was in January.

Q. What year? *A.* That would be '43-'44.

Q. '44? *A.* Yes.

Q. How long were you with the Portland Terminal Company? *A.* One day.

Q. What were you doing? *A.* I was acting as a trainee as a brakeman.

Q. Do you recall having the eye test and physical examination and all that has been testified to, and signing these forms that have been described? *A.* That is right.

Q. Do you recall the name of the conductor you were with? *A.* I don't. No, sir.

Q. How many men were on the crew that you were with? *A.* There were two men in the cab of the Diesel engine, and three men on the ground,—a conductor and trainee, and I was another trainee.

Q. And the two men in the cab of the Diesel engine—were they the fireman and engineer? *A.* They act as that.

Yes. They switch about, as engineers.

Q. Were there no regular yard brakemen on the crew? *A.* There was one regular conductor and—I believe—and the other man told me he was a trainee; he had been there a week or ten days.

Q. What did you do while you were there? *A.* He told me to watch his signals. He showed me how to operate the switches—watch and see how the signals were given.

Q. Did you do any of that? *A.* I did. Yes. He made his motion and I followed suit.

Q. What part of the train was he on, with reference to head end or tail end? *A.* Sometimes he would be near the engine, and sometimes there would be two or three cars on and he would be on the back end of it.

Q. What part of the terminal were you in? *A.* We were out in Rigby yard. I don't know what section that would be classified as.

Q. Was it handling cars . . . *A.* Yes. Making up freights for the larger engines.

Q. Did you do . . . Did you have anything to do with the switches yourself? *A.* I don't believe I operated a switch that day. No. He showed me how, but I didn't operate one.

Q. Did you have anything to do with coupling or uncoupling? *A.* No, sir.

Q. What time did you start in the morning? *A.* I believe I got out there about half past seven. There was no specified date given to me by Mr. Strout, the man who sent me out there, and I got out there about seven-thirty, I believe.

Q. How long did you stay? *A.* Two-thirty I came home.

Q. Was anything said to you about leaving early? *A.* No, sir.

Q. How was the weather that day? *A.* Very bad. It was snowing and raining.

Q. And you were out in the yard doing work? *A.* That is right.

Q. Did you go back again, after that day? *A.* No, sir.

Q. Did you ever get any pay for that day? *A.* No, sir.

Q. Did you ever go out and talk to any of the men on the railroad? *A.* I had some signal books and rules and regulations belonging to the Maine Central which I was told to return; and I went back and returned them to Mr. Strout at the office building on St. John Street. I asked him about a release and he told me to go out to Rigby. I went out to Rigby and I saw the clerk out there—I believe he is. He has a scar on his face where he has been injured on his face at some time.

Q. Did you talk with him? *A.* Yes.

Q. Did you talk to anybody else out there? *A.* That is all I did.

Q. What did you say to him, or he to you? *A.* I asked him about a release. Let's see. I first signed a paper stating that I wished to get through there—something like that. I asked him about a release and he said "No, you can't have a release. If you don't like that work, we have plenty of other work here for you to do." I, in turn, went to the Railroad Retirement Board. They, in turn, got to the War Man Power of the United States Employment Office, and they finally came to an agreement, after three days' consultation between the three, that I was not employed by the Portland Terminal Company,—or the Maine Central Railroad. I don't know. And that I didn't need a release to go on another job.

Q. But in the beginning they refused to give you a release? *A.* That is right. They did.

Q. And you never got any pay for the day that you worked? *A.* I never did. No.

Cross Examination

X-Q. (by MR. PIERCE): Do you remember the names of any of the men who were on parts of the crew of which you were a member that day? *A.* No, I don't.

X-Q. What did you call them? Did you have occasion to speak to them? Just by their first name, or what? *A.* I don't remember calling anybody that day by name. If I did I would have remembered it.

X-Q. You say there were two men in the cab? Two men in the cab? *A.* Yes. On the Diesel engine.

X-Q. Do you mean one of these rather small Diesels that the Portland Terminal Company uses for switching; or one of the great big Diesels that they use for hauling freight? *A.* This was a switching Diesel in there, I think.

X-Q. A switching Diesel? *A.* That is right.

X-Q. And you can't help me out as to the identity of any of the other men that you were with? *A.* No, I can't.

[Witness excused.]

THE WITNESS: Would I be able to go back to work now, Judge?

THE COURT: Yes, you can go back.

MR. PIERCE: Excuse me a minute. (conference). Just one other question.

THE COURT: Ask him from right there.

X-Q (by MR. PIERCE): When you spoke about a release, you mean a release so that you can seek employment somewhere else? *A.* That is perfectly right.

THE COURT: That is what I supposed he meant.

MR. PIERCE: All right. That is all.

[Witness Excused.]

WILLIAM J. COYNE, JR. having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name, please? *A.* William James Coyne, Jr.

Q. Where do you live? *A.* 3 George Street, South Portland.

Q. How are you now employed? *A.* As yard conductor or yard brakeman.

Q. With what company? *A.* Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Five years, February 9th, last.

Q. How old are you? *A.* Twenty-eight.

Q. What kind of work did you do before you worked for the Portland Terminal Company? *A.* I was a clerk in Shaw's.

Q. Do you recall when you started with the Portland Terminal Company? *A.* Striking?

Q. Yes. *A.* It was in the month of January.

Q. Do you recall signing an application or some other forms at the office, and taking the eye test and physical examination? *A.* Yes.

Q. Then were you assigned by the Company to some conductor? *A.* Yes.

Q. Do you remember his name? *A.* Fred Gleason.

Q. How long did you do this striking with Conductor Gleason? *A.* Fourteen days.

Q. How about Sundays? *A.* The job didn't work on Sundays.

Q. So you worked for a fourteen-day period, except for Sundays that may have intervened in the period? *A.* Yes.

Q. What time did you start? *A.* Eight o'clock in the morning.

Q. And how long did you work? *A.* It varied. Some days eight hours and sometimes ten.

Q. Do you remember what trick you were on? *A.* First trick.

Q. That starts when? *A.* Eight o'clock in the morning.

Q. And what part of the Terminal were you in? *A.* Yard 7; on Kennebec Street. Somerset Street.

Q. What kind of work was your crew doing? *A.* Industrial work.

Q. You say you worked some days eight hours and some days more? *A.* Yes.

Q. What was the longest day you were in the crew? *A.* About twelve hours.

Q. Did the conductor or any other member of the crew tell you you could go home after eight hours, or anything like that? *A.* No.

Q. How was the weather? *A.* That month was stormy weather, off and on. January was stormy. It varied.

Q. Were you out in the weather every day while you were doing the striking? *A.* Yes.

Q. Describe what you had to do? *A.* Well, the conductor told me to go with the head brakeman, and the head brakeman would, in turn, show me the motions and switches, and try to give signals—in other words help as I was learning. And if I didn't understand, just stand by a switch until I could—and once in a while I would intercede and help.

Q. Was it any different after a couple of days went by? *A.* Yes. After two days I began to learn the job of breaking in.

Q. Did you do anything different after two days? *A.* I might have got off and turned a switch and give a hand signal. The engine went along and you get off so as to be in sight of the other men of that crew.

Q. Was there any difference between what you did while you were striking and while you were regular? *A.* After you were on regular you were assigned the particular kind of job called head brakeman and you knew your duties. Follow it around. Throw the iron, and ride the engine, and . . .

Q. You did all of that after you were on regular? *A.* Yes.

Q. And you did the same thing before, except that you had someone with you? *A.* He did it part of the time. That was part of his duties. And once in a while I would intercede and throw the iron—for my own benefit.

Q. Were you required to be on your feet, or did you sit most of the time? *A.* You moved most of the time. When you went from one track to another you either rode on the engine or the cars or you walked to the switch.

Q. Did you get any pay at all for those days, except Sundays, during that fourteen-day period? *A.* No.

Q. How did you feel, after the first day or two, after you were on this job? *A.* Well, I felt pretty good. It was a new experience, and I liked the work itself.

Q. After you finished the day, did you feel that you had put in a day's work? *A.* Yes. Because it was a different line from the work I was doing. It was out-doors, and in my other line I had been indoors.

Cross Examination.

X-Q. (by Mr. Pierce): You say that before you went to the Portland Terminal Company you worked for Shaw? *A.* George C. Shaw.

X-Q. That is the grocery store? *A.* Yes, on Preble and Congress Streets.

X-Q. And you thought you would like to learn the railroad business? *A.* Yes.

X-Q. You didn't think, the day that you reported as

trainee, that you were competent to act as a railroad man, did you? *A.* The idea was I wanted to learn how to be a railroad man, because I had several friends—when I was working in the grocery business the railroad men would come in, and I talked to them, and asked them if they would let me know if there was anyone being hired. And at that time the railroad was in need of yard brakemen, and I went out and saw the person who told me all about it.

X-Q. And you started out in the railroad business, and you liked it? *A.* Yes.

X.Q. And you made good at it, apparently? *A.* I hope so.

X-Q. Now during that time how many other men were there in the crew? *A.* Three men, sir.

X-Q. The conductor— *A.* The conductor and two brakemen.

X-Q. I noticed when you stated what you were, you said you were a conductor *and* brakeman? *A.* Yes. That means qualified conductor and brakeman. I can cover three ends of the job; head-end, middle-man, flagman—or conductor.

X-Q. The conductor is the man who is in charge of the crew? *A.* Yes.

X-Q. And depending on how busy they are and the various seniorities, etc., depends upon whether you actually work as conductor or brakeman? *A.* Yes.

X-Q. If you are working as conductor you get more pay than you do as brakeman? *A.* Yes.

X-Q. And gradually, I assume, the older men, if they are competent, are the men who have the conductor's job? *A.* What?

X-Q. Gradually, as you stay on in the service and demonstrate your ability to do the work satisfactorily, you serve more and more as a conductor? *A.* Yes.

X-Q. And less as a brakeman? *A.* Yes.

Redirect Examination.

Q. (Mr. Jansen): Did you have to write in the rule-book, as Mr. Libby did? *A.* Yes, sir.

Q. Do you recall when you did that? *A.* The following night, after I had done my striking, there was a group of us went over to the Examiner's office and he gave us the papers and we copied it from one book to another.

Q. Into a sort of notebook affair? *A.* Yes.

Q. You didn't have to do anything from memory? *A.* No. it was all in the book.

Recross Examination

X-Q. (by Mr. Pierce): That is *after* you went on the board? *A.* No. That is just *before* I went on the board. The day before.

X-Q. In other words, to be sure that you read the book, they had you copy it? *A.* That is right.

[Witness excused.]

CHARLES E. MORGAN, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. TUELL): What is your full name? *A.* Charles E. Morgan.

Q. You are employed by whom? *A.* Portland Terminal Company.

Q. How long have you been with them? *A.* A little over three years.

Q. When you went there, where did you go to make your application? *A.* To Rigby.

Q. You went out to Rigby? *A.* Yes.

Q. And you signed one of the application forms? *A.* Yes.

Q. Then did you take a physical examination? *A.* Yes.

Q. And were you given a letter to a conductor? *A.* Yes.

Q. Do you recall what conductor you were sent to? A. James O'Neill.

Q. What yard was he stationed at? A. At Rigby.

Q. At Rigby? A. Yes.

Q. What time of day did you report to him? A. Eight o'clock in the morning.

Q. Eight o'clock in the morning? A. Yes.

Q. And you worked what shift? A. Until four.

Q. Eight o'clock in the morning until four in the afternoon? A. Yes.

Q. Did you work that regularly? A. Yes, sir.

Q. What did you do the first day, if you recall? A. Well, we were instructed to give motions—repeat the motions after the rest of the trainmen—and watch what they did...

Q. Yes? A. (*continued*):—and try to pick up as much of it as you could, yourself.

Q. Did you do any of the actual work, yourself? A. Later in the training period. Yes.

Q. How long would you say it was before you started doing some actual work? A. Perhaps three days.

Q. And then would you . . . what would you then start doing by yourself? A. Well, you would pull a few pins.

Q. And gradually did you begin to do more of the actual duties? A. Yes. The further you got along the more work you did.

Q. Well, did you do more? A. Well, that is the way they figured I could learn. By doing some of it.

Q. How long did you take your training period? A. Fourteen days.

Q. You worked from eight in the morning? Until... A. Until four in the afternoon.

Q. Was there any suggestion that you could leave earlier if you wished? A. Not that I recall. No.

Q. As far as you knew, you were expected to stay the entire time? *A.* We expected to work eight hours. Yes.

Q. After you completed your training period, did you take any kind of a written examination? *A.* We had to copy those answers out of that book on to that form they had there.

Q. You did that at what point in your training period? *A.* Right after the training period. Between the training period and the time you went on the board—or shortly after.

Q. Later on did you have a written examination? *A.* No.

Q. You didn't have an oral examination? *A.* No.

Q. You just wrote that into a book? *A.* That is all.

Cross Examination

X-Q. (by Mr. Pierce): As you went along through this training period, you became more familiar with the work? *A.* That is right, sir.

X-Q. And were able to do it better? *A.* Yes, sir.

X-Q. And, if I understood you correctly, as you went along through that period, the other members of the crew let you do more and more work? *A.* Yes. That is right.

X-Q. And at the end of the period you knew more about it than when you started? *A.* Yes.

X-Q. And I suppose you know more about it now than you did at the end of that period, don't you, Mr. Morgan? *A.* Yes, sir.

X-Q. How many other men were there with you? *A.* The conductor and the two brakemen.

[Witness excused.]

The Court: When you have finished with these men, I suppose they would like to know whether they are all through.

Mr. Jansen: Yes. You can leave now, Mr. Morgan.

HERMAN F. BERRICK, having been first duly sworn, was examined and testified as follows:—

Direct Examination

Q. (by MR. TUBELL): Will you state your full name? *A.* Herman F. Berrick.

Q. Where are you employed? *A.* Portland Terminal Company.

Q. How long have you been with them? *A.* Four years in August. *This* August.

Q. Where did you make your application for employment? *A.* Rigby Yard office.

Q. And you signed the usual aplication from? *A.* Yes, sir. Usual form.

Q. And took a physical examination? *A.* Yes, sir. And eye test.

Q. And you were given a letter to a conductor? *A.* Yes.

Q. What conductor were you sent to, or assigned to? *A.* Royal McIntire, at the East Yard, at Rigby.

Q. What time did you report to him? *A.* Seven a.m.

Q. When did you work? How long? *A.* Seven to three. First trick.

Q. Was that your regular schedule, each day? *A.* Yes.

Q. And did you work that entire schedule each day in your training period? *A.* We worked seven days, including Sundays.

Q. Including Sundays? *A.* Yes. The job worked Sunday, and I worked the full week out.

Q. Were you ever told that you weren't to work that full period? *A.* No.

Q. What did you do the first day when you started in? *A.* Well, Mr. McIntyre told me to watch the head man for motions, and if I got tired I could go into the engine and sit down. Keep watching for motions all the time.

Q. Did you do any work, yourself, the first day? *A.* No. Not the first time. I just watched and got the idea of the motions.

Q. How long before you did actual work, yourself? *A.* The fourth day. He let me throw switches and try to pull pins.

Q. How much did you do at that point? *A.* I didn't do very much. I watched the head brakeman mostly; to learn my motions a little better.

Q. By the time you finished your training period what were you doing in the way of work? *A.* I was doing what the head brakeman is supposed to do on the job.

Q. You did what the head brakeman is supposed to do? *A.* Yes.

Q. What would the head brakeman be doing while you were performing his duties? *A.* He puts the engine on from one track to another. Pulling pins and throwing certain switches.

Q. I think you said you finished your training period in seven days? *A.* No, Fourteen days. . . . . .

Q. Fourteen days, including Sundays? *A.* Yes.

Q. You worked seven days a week? *A.* Yes.

Q. At the end of your training period were you put on the spare board? *A.* After I wrote my book of rules, the next day I went on the board.

Q. Then did you have any oral examination? *A.* No. You don't get the oral examination until after you qualify for flagman.

Q. Did you get paid at all for the fourteen days that you put in for your training period? *A.* No.

MR. TUELL: That is all.

Cross Examination

X-Q. (by Mr. Pierce): You started out to qualify yourself for this job? *A.* Yes. I had all the intentions in the world of doing it.

X-Q. It never occurred to you to quit before the other fellows did, did it? *A.* No. Because I was anxious to learn. I wanted to go ahead.

[Witness excused.]

Maurice L. Carter, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by Mr. Tuell). What is your full name? *A.* Maurice L. Carter.

Q. How old are you? *A.* Forty-three and a half.

Q. Where do you live? *A.* Saco, Maine.

Q. How long have you lived in Saco? *A.* Off and on, about all my life.

Q. How are you employed right now? *A.* Extractorman; Dame's Laundry.

Q. Did you ever work at the Portland Terminal Company? *A.* Yes.

Q. When was that? *A.* I couldn't say. I haven't got the exact date. A year ago this winter.

Q. A year ago this winter? *A.* Yes.

Q. How did you happen to go to the Portland Terminal Company? *A.* I was employed at that time at the Pepperell, and I couldn't stand under cover, and I saw the ad in the paper, so I answered it.

Q. You say you saw an ad in the paper? *A.* Yes.

Q. Mr. Carter, I am going to show you some issues of the Portland Evening Express; one for January 12, 1944, and another one for January 25, 1944. And I call your at-

tention—I call your particular attention to an ad which is signed by the Maine Central Railroad. Do you recall seeing either of those two ads? *A.* Mine was in the Sunday paper. I remember that, I think.

Q. Sunday paper? *A.* I think so. I wouldn't say for sure.

Q. Do you recall that the ad was signed by the Maine Central? *A.* Yes.

Q. And was it similar to these ads that you see here? *A.* The same thing. Yes.

Q. Look at the one of January twenty-fifth, and see if that is the same thing? *A.* I never noticed that one.

Q. But the other one, you say, is similar to the one you saw, and that is signed by the Maine Central? *A.* Yes.

Q. Did you go to the Maine Central Railroad? *A.* I went to the Railroad Retirement Board.

Q. And, from there, where did you go? *A.* Back to the railroad station.

Q. How did you happen to get from the Retirement Board to the railroad station? *A.* They sent me there.

Q. Who did you see at the railroad station? *A.* I don't remember his name.

Q. What office did you go to? *A.* 22½—

Q. 22½? *A.* I think so. I don't remember.

Q. Was there anything on the door? Any sign? *A.* I never noticed.

Q. You did talk to someone there? *A.* Yes.

Q. What did you do after talking with him? *A.* They sent me upstairs for an eye test.

Q. Did you sign any papers when you talked with this man at the depot? *A.* I don't remember, it has been so long.

Q. Did he speak to you at all about how long you would have to work and what you would get, or anything like that?

A. No. That wasn't mentioned at all.

Q. It wasn't mentioned? *A.* No.

Q. After your eye test and physical examination, did they give some kind of a form or letter to take to a conductor? *A.* Yes. A letter.

Q. Do you remember the name of the conductor? *A.* I was supposed to be under a conductor by the name of Paddy, but he was off sick a week and they put me under another conductor.

Q. Do you know whether that was "Paddy" or "Pettis"? *A.* They called him "Paddy".

Q. He was off sick? *A.* Yes.

Q. And you went under his substitute? *A.* Yes.

Q. How long did you stay there? *A.* I couldn't say.

Q. How many days? *A.* I should say right around seven days. Exactly, I couldn't be positive.

Q. What time did you start in the morning? *A.* Six-thirty, I think.

Q. What time did you get through in the afternoon? *A.* I think half past two or three.

Q. Did you have to ride in from Saco each day? *A.* Yes.

Q. And ride out again in the evening? *A.* Yes. Shipyard bus.

Q. Did you finish your training? *A.* No.

Q. Do you recall the circumstances at all, why you didn't finish? Tell us about that. *A.* Well, when that conductor Paddy came back he asked this other fellow about putting me on as head brakeman, and Paddy's substitute said I wasn't under pay—I was just a striker.

Q. Then what did you do? *A.* I finished the day and quit.

Q. Why did you quit? *A.* I thought if I wasn't going to get any pay I would go over to the Shipyard and get something.

Q. What did you do, during that seven days? *A.* I was under the head brakeman.

Q. Was someone with you? *A.* Just the head brakeman.

Q. What did you do? *A.* He told me to stay on the engine with the head brakeman and watch the signals, and every signal I saw him give I would do the same thing.

Q. What else? *A.* He showed me how to throw switches and pull pins.

Q. And did you do that? *A.* Yes.

Q. Did they ever tell you that you could go home early? *A.* No.

Q. Or that you could come to work late? *A.* No.

Q. Did they ever tell you when you started that you had to work out the full period in order to get paid? *A.* That never was mentioned.

Q. You had seen these ads in the paper? *A.* Yes.

Q. And when Paddy came back someone said "He is not on pay", and you thought, if you weren't getting paid, you might as well quit? *A.* That is the way I understood it.

Q. You never did get paid for the days you put in? *A.* No.

Cross Examination

X-Q. (by Mr. Pierce): Do you remember the name of the man you talked to at the railroad office? *A.* No, I don't.

X-Q. Do you remember what he looked like? *A.* No, I don't know. It has been over a year.

X-Q. You couldn't help us any in attempting to find that particular man you talked with? *A.* No, I don't think I could pick him out.

X-Q. You say nothing was said to you about pay at that time? *A.* No. Nothing said about money at all. I wasn't interested at that time whether I was going to get big or small money. All I was looking for was the work.

X-Q. What were you earning while you worked at the Pepperell? *A.* About thirty-two or thirty-three dollars a week.

X-Q. And you didn't make—in this conversation—you didn't inquire at all as to what you were going to get as starting pay? *A.* No. I considered my health was worth more than money.

X-Q. You didn't know whether you were going to get one dollar, or two dollars or three or four or five dollars a day . . . *A.* No. I wasn't interested as long as I could have my health. I knew if I went to work for them they wouldn't pay me as cheap as a dollar a day.

X-Q. But at the end of seven days, when you found you weren't going to get anything, you quit? *A.* That is right.

[Witness excused.]

MR. JANSEN: Now I would like to read into the record at least part of the advertisement relating to the men working in the Rigby Yard, which is operated by the Portland Terminal Company, and make an offer of proof. Have you any objection to that?

MR. PIERCE: Oh, yes. I don't object to the question of form . . .

THE COURT: The only way he can get his rights established is to make an offer of proof.

MR. PIERCE: I don't object to the question of form.

[Conference between Court and counsel at bench, off the record.]

MR. JANSEN: We offer to prove that the Maine Central Railroad Company, on behalf of the Portland Terminal Company, inserted an ad in the Portland Evening Express for the issues of January 12th and January 25th, 1944, which, among other things, contained the following statement:

"Railroads are seriously in need of men—at once—to keep necessary wartime transportation moving. It is an opportunity for men of all ages to get into railroad service—an essential industry and one that is most vital to the winning of the war. We want—for immediate employment—yard brakemen (yard trainmen) for Rigby Yards. Men hired immediately start a training period of ten days during which they do no actual work, but learn the yards and methods of work under trained supervisor. In this training period men are paid $4.00 per day. At the end of the training period they are immediately assigned to jobs and receive $1.067.5 per hour—" that is $1.06¾— "Minimum day, (8 hours) $8.54. Per hour overtime rate $1.60-1/4. This rate applies for all time worked over 8 hours. Yardmen are now practically earning as much ovetime as they elect to work, up to legal limit of 16 hours per day service."

And the ad is signed by the Maine Central Railroad. In the issue of January 25th, 1945, there appears the ad containing, among other things, the following statement:

"Immediate employment in permanent industry available at Maine Central Railroad. We need at once Yard Brakemen (Yard Trainmen) for work in Rigby Yards. Pay of $4.00 per day during training period. During training period men do no actual work but are instructed by experienced Yard Foremen. At end of training period men are immediately assigned to work. Pay when working is $8.54 per eight-hour day. Overtime per hour (rate for all time over 8 hours) $1.60¼. Yard Men are now practically earning as much overtime as they elect to work up to legal limit of 16 hours per day of service."

And that, also, is signed by the Maine Central Railroad.

Mr. Pierce: I can't remember the exact phraseology used by Mr. Jansen, but with reference to the first offer I think

he stated that he offered to prove that this, at the time it was issued . . .

THE COURT: He said in behalf of the Portland Terminal Company . . . that he would show that it is in behalf of the Portland Terminal Company.

MR. PIERCE: I haven't yet seen any evidence to warrant it.

MR. JANSEN: I expect to have to subpoena some of their officials.

HERBERT E. PICKERING, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. JANSEN): Will you state your full name? *A.* Herbert E. Pickering.

Q. And where do you live? *A.* 122 Brackett Street, Portland.

Q. How old are you? *A.* Thirty-three.

Q. How are you employed? *A.* Now employed at the Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Since February twenty-eighth, 1945.

Q. What kind of work do you do at the Portland Terminal Company? *A.* Yard Brakeman.

Q. Did you go through this so-called training period? *A.* Well, for five days.

Q. What is that? *A.* Five days.

Q. Five days? *A.* Yes.

Q. Do you recall when you started? *A.* I started at two-thirty in the afternoon, and worked until ten-thirty at night.

Q. Do you recall the name of the conductor that you worked under? *A.* I believe his name was Payne.

Q. P-a-y-n-e? *A.* Yes.

THE COURT: When did you say this was? How long ago? *A.* February 28th.

THE COURT: Of this year? *A.* Yes.

Q. Now, had you had any previous railroad experience? *A.* No.

Q. What kind of work had you done before that? *A.* Shipyard.

Q. Worked in the Shipyard? *A.* Yes.

Q. Do you recall the day you first went out during this training period? *A.* February 28th. Yes.

Q. How many men were there on the crew that day? *A.* Three.

Q. Including you? Or without you? *A.* I believe *with* me.

Q. With you? *A.* Yes.

Q. You mean there was the conductor and another brakeman and yourself? *A.* Yes.

Q. Which part of the train did you work on? *A.* Head end.

Q. Head end? *A.* Yes.

Q. Was there another head-man there—a Yard Brakeman. *A.* I don't believe so.

Q. You don't believe there was? *A.* No.

Q. Well, who did you work with the first day that you were there? *A.* Conductor Payne.

Q. Did he tell you what to do and how to do it? *A.* Yes. They showed me how to give signals—and I guess that is about all the first day. Just to give signals.

Q. And what happened the next day? *A.* The next day I gave signals and pulled a few pins.

Q. The next day were you still the only man on the head end? *A.* Yes.

Q. In fact during that entire five-day period . . . *A.* Five days I was head man. Yes.

Q. You say the next day you pulled pins? *A.* Yes.

Q. And what about the third day? *A.* I did the same thing.

Q. And the fourth and the fifth day? *A.* Same thing.

Q. Was there any difference between the kind of work you did during the five days you were in training and the work you did afterwards when you went on the board? Any difference at all in the work you did? *A.* Why, no. Not that I could see.

Q. You were the only head-end man? *A.* Yes.

Q. And after you got through with the training, you went on as a regular head-end man. Is that right? *A.* That is right.

Q. Did you get paid for the five days training? *A.* Yes.

Q. Do you recall how much you were paid? *A.* Four dollars a day.

Q. Were any deductions made from the four dollars? *A.* I couldn't say, right off.

Q. You don't remember that? *A.* I don't remember.

Cross Examination.

X-Q. (by Mr. Pierce): Now the day that you started as trainee was what date? *A.* February 28th.

X-Q. 1945? *A.* Yes.

X-Q. On the shift that started when? *A.* Two-thirty, p.m.

X-Q. And the conductor was a gentleman named Payne? *A.* Yes.

X-Q. Do you know what the name of the other brakeman was?

THE COURT: Did you know him by his first name? *A.* Fred.

X-Q. Had you ever worked on the railroad before? *A.* No.

X-Q. Could you start right out and do the work of a head brakeman? *A.* Well, the things he showed me to do—that is all.

X-Q. The things that who showed you to do? *A.* Mr. Payne.

X-Q. Mr. Payne? *A.* Yes.

X-Q. So that Mr. Payne during that time had to do his work and show you what to do? *A.* That is right.

Redirect Examiation

Q. (MR. JANSEN): Do you recall looking at your check stubs within the last few day, for that four dollars—when Mr. Bither was over to talk with you? I was wondering if I could refresh your recollection about the deductions? *A.* I don't seem to remember.

Q. You don't happen to have those check stubs with you? *A.* Not with me. No, I haven't.

[Excused.]

JOSEPH WALTER WIDOR, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. JANSEN): Your full name is what? *A.* Joseph Walter Widor.

Q. And your address? *A.* 244 Douglass Street, Portland.

Q. How old are you? *A.* Twenty-five.

Q. How are you employed? *A.* Storekeeper, J. E. Gould.

Q. Did you ever do any work at the Portland Terminal Company? *A.* Last October. Two and a half days.

Q. Was that the so-called training period? *A.* Yes.

Q. October, 1944? *A.* Yes.

Q. Did you sign these applications and other things we have been talking about? *A.* Yes.

Q. Do you know the name of the conductor? *A.* Conductor Burbank.

Q. Burbank? *A.* Yes.

Q. How long did you work? *A.* Two days and a half.

Q. Do you recall the date that you started? *A.* On or about October sixteenth.

Q. How did you happen to work two and a half days? *A.* I had to quit, due to my knee. I have a bad knee. Jumping off and on the cars, it clicked on me and locked, and I had to quit.

Q. That was at the end of that two and a half days period? *A.* Yes.

Q. You had taken the physical and the eye test? *A.* Yes.

Q. Do you recall who you were assigned with when you first went on? *A.* Two and a half days with Conductor Burbank.

Q. Were you on the head end? *A.* No. The first day I followed Burbank and he showed me what to do and how to do it, and I had to repeat his motions. The second day I did a little more, and the third day I was there I was pulling pins and jumping off cars until I hurt my knee; and I told Mr. Burbank I was all through, and went up to the office and saw Mr. Johnson, and he talked to me a few minutes and I walked out; and that was all for that.

Q. Did you ever get paid? *A.* No.

Q. Did you have any talk or conversation about it? *A.* I was notified I was to get four dollars a day while training.

Q. How were you notified? *A.* I was told.

Q. Who told you? *A.* Mr. Strout and Mr. Johnson.

Q. Did you ask for it? *A.* No.

Q. Did they offer it to you? *A.* No.

Q. Did they say you would have to complete the training, or anything like that? *A.* No.

Q. Did you talk to them about pay at the end of two and a half days? *A.* No.

Q. But you never did get paid? *A.* I never did get paid. I never asked for it.

Q. What time did you start in the morning? *A.* Six-thirty to two-thirty.

Q. Did anybody ever tell you that you could leave early? *A.* No.

Q. Or come late? *A.* No.

Cross Examination.

X-Q. (by MR. PIERCE): When you started, you thought your knee would hold out? *A.* That is right.

X-Q. And you didn't have any intention of quitting the job you were trying to learn? *A.* No.

X-Q. You went in and did the best you could? *A.* That is right.

X-Q. And stayed with the boys as long as they worked? *A.* That is right.

X-Q. You wouldn't seriously have thought that the conductor would have thought much of you if you wanted to quit in the middle of the afternoon, would you? *A.* No.

[Witness excused.]

HOWARD L. CLARK, having been duly sworn, was examined and testified as follows:

Direct Examination.

Q. Will you state your full name? *A.* Howard L. Clark.

Q. Where do you live? *A.* 1577 Washington Avenue, Portland.

Q. Where do you work now? *A.* National Biscuit Company.

Q. Have you ever worked for the Portland Terminal Company? A. Yes.

Q. When was it? A. Last September.

Q. How long were you there? A. Six days.

Q. Did you sign these forms and take this eye test and physical that you have heard described here in court? A. Yes.

Q. Did you have any talk about pay or compensation at all? A. They said I was to receive four dollars a day.

Q. Who told you that? A. I believe it was . . . At the office on St. John Street.

Q. Did they tell you that you would have to complete your training? A. No.

Q. They just told you that you would get four dollars a day? A. Yes.

Q. Do you recall being sent out and assigned to a certain conductor? A. Yes.

Q. Do you remember his name? A. No, I don't remember.

Q. What did you do the first day? A. I went on with the head brakeman and followed his signals.

Q. And what else did you do? A. Well, that was all for the first day. I just went through the motions with the head brakeman.

Q. And on the second day what did you do? A. I pulled a few pins.

Q. And the third day? A. The same. And throwing switches.

Q. When did you get through or when did you quit or finish or stop doing that training? A. After my sixth day.

Q. What did you do then? A. I quit after six days.

Q. Did you see any of the officials of the railroad at all or talk to them about it? A. Yes. I went in after gasoline

to make my trip back and forth, and they told me I couldn't have no gasoline until I was through my training. So I couldn't do that. No gas, no work.

Q. When you got through with your training did you ever get your four dollars? *A.* No.

Q. Did you ever ask for it? *A.* Yes.

Q. Who did you ask? *A.* I don't know. I was up there in the office. They told me where to go. I went up and asked for my pay and they said they had no record of my being there.

Q. Did you talk to anybody else? *A.* No.

Q. In answer to your question they said they had no record of yohr being there? *A.* They had no record. No.

Q. You never did get paid? *A.* No.

Cross Examination.

X-Q. (by Mr. Pierce): Where do you live? *A.* 1377 Washington Avenue.

X-Q. Where were you working? At Rigby? *A.* Commercial Street.

X-Q. Oh, Commercial Street? *A.* Yes.

X-Q. And the reason you quit was because they couldn't or wouldn't give you extra gas .... *A.* They wouldn't give me gas to go back and forth to work with.

X-Q. That was the reason you quit? *A.* Not absolutely. No. I was in the Service and I have one club foot and I couldn't take it.

X-Q. You mean you couldn't physically do the sort of work these men have to do? *A.* Yes.

X-Q. So the reason you quit was sort of a combination of the two? *A.* Sort of a combination. Yes.

Redirect Examination

Q. (by Mr. Jansen): You found this— By the way, was it an injury you had in the Service? *A.* A club foot.

Q. And you found after six days that you couldn't continue to do the work? *A.* That is right.

Q. You had to jump up and down on and off the train? *A.* Yes, that is right.

[Witness excused.]

THE COURT: We will recess here until half past two this afternoon.

[Recess was then taken until 2:30 o'clock p.m.]

AFTERNOON SESSION.

The Court came in at two-thirty o'clock, p.m., and the taking of testimony proceeded as follows:

MR. JANSEN: May it please the Court, it is my understanding that the defendant does not dispute the fact that the advertisements which we referred to this morning were inserted by the Maine Central on behalf of the Portland Terminal Company.

MR. PIERCE: At least they were inserted with the knowledge of the Portland Terminal Company.

MR. JANSEN: And in its behalf? For their benefit?

MR. PIERCE: I don't know about their benefit. They were inserted with their full knowledge.

THE COURT: It doesn't make much difference. They may be admitted.

MR. PIERCE: As a matter of fact, Mr. Douglass whom I contacted is the senior executive of both companies, and he knew about the ads.

MR. JANSEN: I see.

ROBERT B. HANEY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name? *A.* Robert B. Haney.

Q. And where do you live? A. 74 Deering Street, City.

Q. How old are you? A. Nineteen.

Q. You are a son of Dr. Haney? A. Yes.

Q. Are you working at the present time? A. No. Going to school.

Q. What school? A. Portland High School.

Q. Did you ever work at the Portland Terminal Company? A. Yes.

Q. Do you recall when that was? A. I don't know the exact date. It was some time the latter part of November or the first of December.

Q. 1944? A. Yes.

Q. And how long—how may days—were you at the Portland Terminal Company? A. It was eight . . . No. It was either nine or ten. I am not sure which.

Q. Was that during a training period as a Yard Brakeman? A. Yes.

Q. And do you recall signing some application forms and taking an eye test and having a medical examination, such as have been testified about? A. Yes.

Q. Who paid for the medical examination? A. I did.

Q. Do you recall how much you paid? A. Two dollars.

Q. Your father didn't give you the examination, did he? A. No. He isn't allowed to.

Q. Do you recall being assigned to a conductor out in the yard? A. Yes. Mr. O'Neill.

Q. How long were you there? A. Either nine or ten days.

Q. Was anything ever said to you about the time you would come and time you would go? A. They told me to be there about eight, and I wasn't to leave until four in the afternoon.

Q. Who told you that? A. Well, my conductor.

Q. Your conductor told you that? *A.* I mean he didn't say particularly . . .

Q. Did you ever start to leave the job early or anything like that? *A.* No.

Q. To go to lunch? *A.* No.

Q. Do you recall that on one occasion that you left five minutes early to go to lunch? *A.* Yes.

Q. Will you tell us about that? *A.* My conductor just told me I hadn't ought to leave the job ahead of the time that the rest of the fellows did.

Q. Do you recall ever coming down late? *A.* Yes.

Q. Did anyone say anything to you about that? *A.* The fireman. He told me I ought to be there on time. I missed the bus and didn't get there on time.

Q. That was during this training period? *A.* Yes.

Q. Did you do any work while you were training? *A.* Yes.

Q. Describe in your own words what you did and how you progressed along through that training period? *A.* I was assigned to Mr. O'Neill and he started me to go with the man on the head end, which man had been there about six months; and he showed me the switches to pull and when to pull them, and so forth, and I was supposed to stick to him most of the time.

Q. Did you start right in doing all of the head-end man's work at the very beginning? *A.* He did a lot of it; and I was right with him and he told me when to do it.

Q. Did that change in any way, as your training period progressed through the days? *A.* Well, I did a little more each day.

Q. And, toward the end, what were you doing? *A.* Well, I was doing just about . . . well, I was right with the brakeman most of the time.

Q. Did you do all the things that the brakeman did? *A.* Yes.

Q. And were you there every day during that time? *A.* No, I was sick one day. And I didn't come in on a Sunday when they told me I should have.

Q. Who told you that? *A.* The fireman. My crew didn't work— The job I was on didn't work Sundays. But when I came in Monday the fireman told me I should have come in Sunday.

Q. And then at the end of that time did you get any pay for the period at all? *A.* No.

Q. Did you ask for it? *A.* I inquired about it. That was the agreement when I went in. If I didn't finish the period I didn't get paid. So I didn't ever expect any.

Q. How come that you didn't finish? *A.* I said I didn't want to railroad—laboring—and I went back to school.

Q. Was there anything about the work you didn't like? *A.* No. It was pretty cold. That was all.

Q. Were you out in the cold when you worked? *A.* Yes.

Q. Every day? *A.* Yes. Except the one I mentioned that I didn't go to work.

Q. One day when you were sick; and also a Sunday that you didn't show up? *A.* Yes.

Q. And they mentioned about that Sunday, the next day? *A.* Yes.

Cross Examination.

X-Q. (by Mr. Pierce): It was the fireman who told you that you should have come on Sunday? *A.* Yes.

X-Q. The fireman wasn't your boss? *A.* No.

X-Q. That was just a bit of advice he was giving you? *A.* Yes.

X-Q. From a man, to a young fellow whom he liked? *A.* Yes.

X-Q. The day that you were late and the conductor spoke to you was because you happened to miss the bus? *A.* Yes. Well, the conductor didn't speak to me about being late. It was the fireman.

X-Q. You wouldn't have thought of being late, yourself, except for the accident of missing the bus? *A.* Yes.

X-Q. If you were going to go any place to learn a job you would show up when the crew did? *A.* Yes.

X-Q. You would expect any sensible fellow to do that, wouldn't you? *A.* Yes.

X-Q. And you expected to, yourself? *A.* Yes.

Redirect Examination.

Q. (by MR. JANSEN): But it was the conductor who told you that you couldn't leave ahead of time for lunch? *A.* He didn't say I couldn't. He said I had better not.

[Witness excused.]

WILLIAM A. O'NEIL, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* William A. O'Neil.

Q. How old are you? *A.* Fifty-eight.

Q. Are you employed at the Portland Terminal Company? *A.* Yes.

Q. What kind of a job have you got down there? *A.* Yard conductor.

Q. How long have you been with the Portland Terminal Company? *A.* Thirty-five years.

Q. How long have you been a yard conductor? *A.* Since 1912.

Q. During that period of time have you had occasion to have a number of trainees under you? *A.* Yes. Quite a few.

Q. Will you please describe, in your own way, how you go about instructing these trainees? *A.* Well, when they come to work the first day we give them a little advice and let them ride around in the engine and get used to the motion. Then when they feel they are secure we take them out on the ground and let the head-end man give them all the instructions he can—plus what I can give them, too.

Q. Do you have them do any work? *A.* Yes, sir. They start right in working.

Q. They start right in? *A.* Yes, sir.

Q. What are some of the things they do? *A.* The first thing, we try to get them to get the motions and get them right. And, if there are any switches to be thrown, get them to throw the switches. Break them in as good as we can.

Q. How about air hoses and steam hoses? *A.* We don't handle any steam hose.

Q. What trick are you on? *A.* Eight to four. The first trick.

Q. What part of the Terminal? *A.* All around. All over the Terminal.

Q. You say you don't handle steam hose? *A.* No. Just air hose. Not letting them go in between until they are there three or four days.

Q. But after that . . . *A.* Then we show them how to hook air hose.

Q. How about pulling pins? *A.* Not until after at least three days.

Q. How about after that? *A.* Then break them in pulling pins.

Q. How about dropping pins? *A.* Making couplings?

Q. Yes? *A.* We have automatic couplings.

Q. How soon can they do that? *A.* They can do that the

first day. We show them how to do it.

Q. When do these men starting during the day? *A.* They start when the crew starts at eight o'clock in the morning—on our job.

Q. When do they quit? *A.* At four o'clock, when we quit.

Q. Do you expect that every day . . . *A.* We expect them to be there from eight to four. Yes.

Q. Do you remember Mr. Haney, who just testified? *A.* I do. Yes.

Q. Do you recall supervising his training? *A.* I do. Yes, sir.

Q. Do you supervise these men while they are in training and watch what they are doing? *A.* All I can. Turn them over to the head-end man. And if there is any chance when we are working on lead jobs we take them up with us to show them what we are doing.

Q. And either you or the head-end man gives them their orders? *A.* Or the middle-man.

Q. Or the middle-man? *A.* Either one. Yes, sir.

Cross Examination.

X-Q. (by Mr. Pierce): Who is responsible, Mr. O'Neil, to determine when one of these trainees is competent to go on as a regular—I don't mean regular from the point of view of pay—but to become a yard man? *A.* The conductor on the job.

X-Q. And before the man goes . . . Strike that out. I show you Plaintiff's Exhibit 5, and I will ask you if you have seen documents similar to that? *A.* Yes, I have.

X-Q. And before the man reports to go on the board does the conductor sign one of these? *A.* Yes, the conductor signs and sends it in.

The Court: What does it say?

[Mr. Pierce reads Plaintiff's Exhibit 5 to the Court.]

MR. PIERCE: The blank apparently being to put in the word "No".

THE WITNESS: That is right.

X-Q. And at the bottom of that, will you read what is here? *A.* "I have been instructed by conductor——blank ——fully as above and understand." And then the trainee signs his name.

THE COURT: Unless that is filled out he wouldn't go on the board? *A.* They wouldn't accept him in the office unless that is filled out.

Q. In other words, practically speaking, and going back to the language of school, this is the certificate from the conductor, as examiner, that the student is— *A.* O.K.

X-Q. O.K.? *A.* Yes.

THE COURT: Strictly, it is his qualifications.

X-Q. Whether or not one of the things you attempt to look after is to see that the trainee will avoid unnecessary danger to himself? *A.* That is the first thing we tell them.

X-Q. And I assume that you try to see that he doesn't cause unnecessary danger to the other men in that crew? *A.* Yes, we have to do that.

X-Q. And also that he doesn't damage the property of the road or the shippers? *A.* That is right.

X-Q. In order to give adequate instruction to these young men, is it necessary, from their point of view, that they be around when the crew starts in the morning? *A.* Yes, sir.

X-Q. And if they are to complete their instruction work within a reasonable time is it advisable to have a man on the crew work . . . *A.* All the time when the crew is working.

X-Q. The crew on which a trainee is employed,—is that assigned to some particular duties? *A.* It is anything we are ordered to do in the Terminal.

X-Q. Is this a fair statement: That it does the same work which it would do if the trainee was not there? *A.* Yes.

X-Q. No more and no less? A. No more and no less. No, sir.

X-Q. Would it be in your judgment practical not to have these men throw switches and give signals? *A.* No. The man would never learn if he didn't. I would never turn him in unless I could see that he could throw a switch and give proper signals.

X-Q. Did you ever play baseball? *A.* Yes, many times.

X-Q. A man can't learn to play baseball out of a book or from watching a game? *A.* No, he can't.

Redirect Examination.

Q. (by MR. JANSEN): The best way they can learn is by doing things? *A.* By making them do the work. Yes.

Q. Do the number of days that the men have to be on training vary at all? *A.* I don't understand what you mean.

Q. I mean do some men work in training a longer period than others. Do you turn them in quicker in some cases? *A.* Some men have been turned in in three days. Others in five. And others in seven days. Others have gone two weeks. Most of the men I have went the full fourteen days.

Q. And then you turned them in? *A.* Yes.

Q. Did you turn them all in? *A.* I have turned every man that worked for me in. Yes.

Q. And you never turned anybody down? *A.* Except this man Haney.

Q. Well, he actually quit? *A.* Yes, he quit on me, and I had to turn his papers in as not being present.

Q. In other words, you never have had to recommend against any man working under you? *A.* No, I haven't.

Q. And you have been training employees for how many years? *A.* Oh, for a long while.

Recross Examination

X-Q. (by MR. PIERCE): Do you recall any other men in your experience that, for reasons of their own, haven't seen fit to complete the training period? *A.* Yes. There was one or two men—one or two other men—who came to work for us, and for some reason never showed up after the second day.

MR. PIERCE: That is all.

[Witness excused.]

LEON IRA BURBANK, having been first duly sworn was examined and testified as follows:

Direct Examination

Q. (by MR. TUELL): Will you state your full name? *A.* Leon Ira Burbank.

Q. Where do you live? *A.* 499 Main Street, South Portland.

Q. You are employed where? *A.* Portland Terminal Company.

Q. What is your employment there? *A.* Yard conductor, at the present time.

Q. How long have you been with the Company? *A.* I have been with them now since January 17th, 1917.

Q. 1917? *A.* Yes, sir.

Q. Have you been a conductor all of that time? *A.* No, sir.

Q. How long have you been a conductor? *A.* Off and on since January 19th, 1919, I believe the date was that I qualified.

Q. What yard are you working in at the present time? *A.* Rigby.

Q. Have you had various trainees under you, from time to time? *A.* Yes, sir.

Q. Do you know, or have you any idea, how many you have had? *A.* I don't know just how many, but I have had plenty of them.

Q. You have had plenty? *A.* I have had plenty. Yes.

Q. When they come to you for training do you instruct them as to what hours they are expected to be there? *A.* I do. Yes, sir.

Q. What do you tell them about that? *A.* On the job I am on now, I tell them they are expected to be there at six-thirty, and work until two-thirty. Those are our hours of work.

Q. What do you do? Tell us, as briefly and as fully as you can, what you have them do in the course of their training? *A.* The first day they come on I try and keep them with me and explain what the motions are and show them the motions we use and what the motions mean, and instruct them on keeping a safe clearance from the cars. As they go along and become more accustomed to the cars I show them how to give motions and throw switches and separate the cars and pull pins, so to speak; make couplings. As they go along and become more adept at the work, I go along with them and show them how to operate the brakes and how to couple hose, and show them the different places —if there are any close clearances—any switches that they have to watch out for in particular—I show them the places where they have to be particular about taking care of themselves.

Q. How soon do you actually get them started doing some of the things you show them how to do? *A.* The first day they stay with me, and I give the motions and explain to them and get them to give the motions. And the second day some men will seem to take hold and they will act as if

they wanted to get into it and they will go along and pull a pin.

Q. And each day do they do a little bit more of the actual work? *A.* As they go along and become accustomed to the surroundings and the work they take hold better; some faster than others.

Q. As they get near the end of their training period are they able to do just about as much as when they complete their training period and go on the spare board? *A.* Some of them. Some of them are able to do as well in six or seven days as others would be in ten to fourteen days. More so. According to the way the man takes hold.

Q. And, even after they are on the spare board, do you still have to supervise them to some extent? *A.* Well, there are things we all learn. I have been at it a long time and I learn things as I go along, now.

Q. Do you recall any instance where any of the trainees have had occasion to substitute or fill in for any regular member of the crew? *A.* I had one man under me; he worked with me either thirteen or fourteen days. And the next to the last day or the last day he worked for me they called a spare man for the job in the morning, and there was nobody came to me, and I went along expecting a spare man to show up. And it went along, and I went and asked for a spare man, and they said the man showed up, and I said "I didn't see any spare man." And they said to me, "What are you doing?" And I said, "This student is chasing the engine for me the best he can until I get somebody." Well it seems that the man they called for the job, he went to him—he went to my student—instead of coming to me. Instead of coming to me he went to him and he told him there was a crew there. The man went home and

called the crew dispatcher up, and the crew dispatcher told him to come down, which he did.

Q. So for a period of time that trainee was filling in as a crew man? *A.* For a short period of time, he did. He had been working with me long enough so he *should* have been capable of going along.

Q. Did you keep any record of the hours that these trainees work? *A.* My work has been from six-thirty to two-thirty for a number of years. They come to work with me in the morning when I go to work and they are there until we get through at two-thirty.

Cross Examination

X-Q. (Mr. Pierce): Let me understand about this instance that you spoke of. I didn't get it quite clear. You say that the spare man, who was sent in to you by the regular method that the Company has, came, and instead of reporting to you he saw—who? The trainee, did I understand you to say? *A.* The trainee that was on the engine.

X-Q. Yes. And the trainee told him there was a full crew? *A.* Yes. That is the idea.

X-Q. The trainee wasn't instructed by you to tell him anything like that? *A.* No, I didn't know anything about it until afterward.

X-Q. He happened to be pretty ambitious? *A.* He was one of those fellows who knew all the answers.

X-Q. That wasn't in accordance with any railroad practice that was authorized? *A.* No, sir.

X-Q. I am almost sixty—How old are you? *A.* If I live to the last day of August I will be fifty-five.

X-Q. There are a lot things I could learn about the law business, and there are lots of things you could learn about the railroad business? *A.* Yes. There are lots of things I don't know at all.

X-Q. When you certify that one of these trainees is fit to be put on the spare board, there are a lot of things for him to learn as he becomes more efficient? *A.* Yes, sir.

X-Q. Your certificate means that he is worth some money to the road and entitled to get paid? *A.* Yes.

X-Q. And if you should certify a man and he turned out to be no good, the blame would be upon whom? You? *A.* I don't think so. I give the man all the instructions I possibly can, and if he gets so he thinks he knows more than I do and disregards what instructions I give him and knows more than I do—I don't know what you would call it.

X-Q. What I mean is, when you certify a man it means that in your judgment he is a proper man to go to work? *A.* He should be.

X-Q. And to the best of your knowledge he *is*. Otherwise you wouldn't sign the certificate? *A.* That is right.

X-Q. From a practical point of view, would it work if these trainees were reporting at all times of the day, whenever they happen to get good and ready? *A.* No, sir.

X-Q. From *their* point of view would they get good instructions that way? *A.* I don't think they would.

Redirect Examination.

Q. (by MR. JANSEN): In this instance about the man who filled in for a while for a crew member; he had been working actually a little while before the spare man had reported? *A.* He had been with us. Yes.

Q. I mean on that particular day he had been working a little while before the spare man came. *A.* Just the same as he had been every day.

[Witness excused.]

NORMAN W. PETTIS, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by Mr. Tuell): Your full name is what? A. Norman W. Pettis.

Q. Where do you live, Mr. Pettis? A. 175 High Street.

Q. Where are you employed? A. Portland Terminal Company.

Q. How long have you been with them? A. Thirty-nine years and six months.

Q. Thirty-nine years and six months? A. Yes.

Q. What is your present employment there? A. Yard conductor.

Q. What Yard are you working at? A. Yard Eight. On Commercial Street.

Q. In the course of your experience as a conductor with the Portland Terminal Company, have you had various trainees under you? A. A few.

Q. A few? A. Yes.

Q. Have you any idea how many? A. No.

Q. When they report to you, will you tell us as best you can how you conduct their training? A. Well, we keep them on the ground with us and instruct them to give motions and start them throwing switches.

Q. How soon do you start them doing some of those things? A. We don't allow them to pull any pins until three or four days.

Q. Is that the first thing they actually do? A. No. They give signals and throw switches.

Q. How soon do they begin doing that? A. The first day.

Q. And then, later, they begin to pull pins? A. Yes.

Q. And, as they go along, do you give them more and more actual work to do? A. Yes. As they improve we give them more work.

Q. And by the time they have reached the end of their

training period are they able to do quite a bit? *A.* Supposed to be.

Q. What are your hours? *A.* Six-thirty a.m., to two-thirty p.m.

Q. Do you expect your trainees to work the same hours? *A.* Yes.

Q. Do you give them the instructions on that point? *A.* I have never had any opportunity to do so. They have always showed up at six-thirty and went to work when the crew did and went home when the crew did.

Q. And you expected them to stay until the crew does go home? *A.* What?

Q. I say, you expect them to stay until the crew does go home? *A.* Yes.

Q. Do you recall having Mr. Libby on your crew back in 1941? *A.* Yes.

Q. Did he qualify quite rapidly, if you recall? *A.* Yes, he did. He worked on the section before he went to braking.

Q. How soon did you feel that he would have been qualified to go on the spare board? *A.* I don't remember how many days. I know I sent him to Rigby before his time was up.

Q. You have no idea how long that may have been? *A.* No.

Q. But, in any case, you did send him in before the fourteen days were up? A. Yes.

Q. And what happened? *A.* They sent him back to finish his time.

Q. Do you keep any records of the trainee's time at all? *A.* No, sir.

MR. TUELL: No further questions.

MR. PIERCE: I think the cross-examination of this witness would just be cumulative, Your Honor. I have no questions to ask the witness.

[Witness excused.]

MR. JANSEN: I guess that is all, Your Honor.

[Conference between counsel, off the record.]

MR. JANSEN: May it please the Court, I think counsel are agreed that the record may show that the 3¼ percent Railroad Retirement tax is deducted from the four dollars a day that is paid to the trainees who have completed the course.

MR. PIERCE: That deduction is made because of an understanding on the part of the Paymaster's Department that it is compelled by the Federal Tax Law.

MR. JANSEN: The plaintiff rests.

MR. PIERCE: Could we have just a minute, Your Honor.

THE COURT: Yes.

[Conference, off the record.]

PATRICK JOSEPH TRACEY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. PIERCE): Will you state your full name? *A.* Patrick Joseph Tracey.

Q. What is your position? *A.* Chief train crew dispatcher.

Q. What does the chief train crew dispatcher do? *A.* He keeps all the records of the men called on to the crews for the Portland Terminal Company.

Q. And were you so employed on February 28th, 1945? *A.* Yes, sir.

Q. I show you a page marked Defendant's Exhibit A, and ask you what that page is a record of? [Defendant's Exhibit A marked.] *A.* It is a record of all the crews on February 28, 1945.

Q. Does it show the record of a crew of which a conductor named Payne was the conductor? *A.* Yes, sir. Crew 23. Conductor Payne. W. H. Payne.

Q. Who else were members of that crew on that date? *A.* P. P. Conley and F. M. Small.

Q. Are Mr. Conley and Mr. Small yard brakemen? *A.* Yes.

Q. And regularly employed? *A.* Yes. Regular men.

MR. PIERCE: I offer this page—as I understand it, this book is in current use—

THE COURT: Can't you read enough into the record so it will be clear what it is?

MR. PIERCE: Defendant's Exhibit A is stated by the witness to be a page of his regular record which shows all the crews of the Portland Terminal Company for the twenty-eighth day of February, 1945. Listed under Number 23 are the names of W. H. Payne, P. P. Conley, and F. M. Small. And we offer that exhibit.

MR. JANSEN: No objection.

THE COURT: Admitted.

Q. Is the first name, of the three names that appear in each of these groups— *A.* That is the conductor.

Q. And the other two are yard brakemen? *A.* Yes.

Q. Does this record show anything about whether or not there were trainees on one of those crews? *A.* No. There is no record of trainees.

Cross Examination.

X-Q. (By MR. JENSEN): Do I understand that you don't keep any record of trainees that have worked? *A.* Not until they are turned in. The conductor has their slip that is given at the office when they go out as trainee. After they have completed their training the record goes on the board and the record is kept just the same as any other men. They are paid by separate voucher when they are on training.

X-Q. You mean when they have completed the training period? *A.* Yes.

X-Q. Paid on separate voucher? *A.* Yes.

X.Q. You keep no record of them at all? *A.* No. Sometimes they don't finish their training. They just drift away and we never see them again.

X-Q. This record you made in regard to Payne, Conley and Small,—is that made when the men are called? *A.* That is completed that day. If a man on a regular assignment is off, it shows on the outside, here *(indicating)*.

X.Q. You don't actually see the men report on the job, and then put their names on this book? *A.* No. If they are not on the job the conductor calls up when they are due to work and lets me know that they are not on the job.

X-Q. And then you call another man? *A.* Yes.

X-Q. And you put another man's name in red ink? *A.* Right here *(indicating)*. Not necessarily red. It just happens to be red there. If he is called on the job the record should check with the time slips.

X-Q. So, if the conductor never called and said one of his two brakemen were absent, you wouldn't have any occasion to call a spare man? *A.* That is right. All men report off through my office.

X-Q. If the conductor was satisfied to use a trainee instead of one of the regular brakemen, you would have no way of knowing? *A.* They don't do it without calling up the office for permission. They *do* do *that*. I have had men worked in the morning from seven to three and they reported them OK, and I was a man shy and put him on the board as a regular in the P.M. I have had men who were trainees in the A.M.

The Court: What were they in the P.M. *A.* Regular brakemen.

X.Q. If it was in the middle of their training would they go back to their training the next day? *A.* No. Once they are turned in they don't go back.

X-Q. The conductor's approval may not have been sent in— *A.* No. The conductor's approval has to come in before that is done.

X-Q. How could you put them in in the A.M. as trainee and P.M. as head-brakemen? *A.* The conductor would be on the job outside the office and send them in.

THE COURT: He would be converted into a brakeman? *A.* Yes, if he was turned in by the conductor.

THE COURT: And he would stay there? *A.* Yes.

THE COURT: Like the caterpillar and the moth; he couldn't go back.

Q. (by MR. PIERCE): The conductor would sign the slip recommending the man for employment? *A.* That slip has to come into the office first.

[Witness excused.]

JAMES L. QUINCY, having been first duly sworn was examined and testified as follows:

Direct Examination.

Q. (MR. MILLER): Will you state your full name? *A.* James L. Quincy.

Q. And your position? *A.* Assistant Superintendent, Portland Terminal Company.

Q. What are your duties? *A.* General supervision of the Portland Terminal Company employees.

Q. Do you have direct supervision over the yard crews of the Portland Terminal Company? *A.* Yes.

Q. Now, Mr. Quincy, you have heard the testimony during this entire hearing? *A.* Yes, sir.

Q. And you have heard Plaintiff's Exhibit 5 referred to? *A.* I have.

Q. What is it? What is Plaintiff's Exhibit No. 5? *A.* That is Portland Terminal Company's Examination Form Number 3.

Q. What is it used for? *A.* Used for a trainee when he completes his tour of duty and is turned in by the conductor.

Q. Turned in to whom? *A.* To my office.

Q. Did you hear Mr. Libby state he brought one of these papers to your office and then was returned to finish his training? *A.* If that was done it was done with no authority.

Q. What are instructions with reference to that? *A.* When the conductor gives us the slip and turns him in as all right, he has to go on the board.

Q. And he isn't permitted to go back and finish the fourteen days? *A.* That is right.

No cross-examination.

[Witness excused.]

HARRIS L. STROUT, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. MILLER): Will you state your full name? *A.* Harris L. Strout.

Q. And your positoin? *A.* Train Master, Maine Central Railroad.

Q. Are you a Portland Terminal Company officer or employee? *A.* Maine Central. I am not a Portland Terminal man.

Q. Whether or not it is true that you interview applicants for Portland Terminal Company jobs? *A.* It is true.

Q. How does that come about? *A.* Well, the reason for that is that men apply to the Retirement Board, or to our employment office at 242 St. John Street, in regard to positions as brakemen and trainmen, and they send them to my office to give them an eye test and also fill out an ap-

plication blank after I explain to them the nature of the work. Then they are sent to our Company Doctor—Dr. Charles Cragin, for a physical examination. If that is satisfactory they are instructed to report to Mr. Quincy's office in the general yard at Rigby.

Q. What papers, if any, do the applicants for Portland Terminal Company jobs sign in your office? *A.* He takes his eye test first, and if that is OK he signs, after it is filled out; giving the condition of his eyes.

Q. I show you Plaintiff's 2, and ask you whether that is a form filed in and signed in your office? *A.* That is the application that is filled in and signed in my office.

Q. And, in the second paragraph, I call your attention to applications for four different positions. What are those positions, please? *A.* The first is "Student privileges". If this man is a student or planning to be a student, and hasn't had any previous railroad experience as a trainsman, the other three are scratched out. If he has had experience, the top and two last ones are scratched out.

Q. Do you have any conversation with the applicant in respect of remuneration? *A.* I tell him that the period that he is a student, provided he works out his full student period, he will receive four dollars a day for ten or twelve days—whichever time it takes for him to complete the period.

Q. And if he doesn't work out that period? *A.* That doesn't apply.

Q. And is it your invariable practice to have such a conversation with these applicants? *A.* I always do. I try to give them the full story, and the nature of the work, and what is expected of them.

The Court: Do I understand if he isn't certified by the conductor he gets no pay at all? *A.* That is right. He has

to do his work so that the conductor is satisfied that he would be a proper man for the job.

THE COURT: If he is recommended for the position he gets pay for what time he has put in, but otherwise not? *A.* If the conductor recommends him as qualified to go on the board as spare brakeman, he is entitled to four dollars a day.

MR. JANSEN: No questions.

[Witness excused.]

JOHN F. JOHNSON, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. MILLER): Will you please state your full name? *A.* John F. Johnson.

Q. And your position? *A.* Chief Clerk to the Assistant Superintendent, Portland Terminal Company.

Q. That is, Chief Clerk to Mr. Quincy who has just testified? *A.* Yes.

Q. And where is your office located? *A.* Our office is located in the general yard office at Rigby.

Q. What do your duties consist of? *A.* My duties consist of supervising the work in the office, and interviewing new help that comes in looking for positions.

Q. Whether or not you interview all applicants for Portland Terminal Company yard jobs? *A.* No, sir.

Q. Do you interview some of them? *A.* Yes. Some of them.

Q. And do some of those applicants come to you in the first place? *A.* Some come in the first place as new men, and some come from Mr. Strout's office.

Q. In the case of an applicant who sees you first, what takes place? *A.* When they first come in I ask them if they

have had any railroad experience or not. If they have had railroad experience, why we send them over to Mr. Quigley's office to take an eye test and have a physical examination. After that they come back and they are put on the board to go to work, if experienced men. If they are not experienced, they are sent to Mr. Quigley's office for an eye test and also an examination, and when they come back, then, we put them on with a regular crew as a student.

Q. You have heard all the testimony in this hearing? *A.* Not all of it. No.

Q. Well, in your office, what papers do you require these applicants to sign, Mr. Johnson? The inexperienced applicants? *A.* They fill out the regular application—

Q. That is, Plaintiff's Exhibit No. 2 *(indicating)*? *A.* Yes, sir. They fill out this application.

Q. And what else? *A.* And they fill out a form that asks if they belong to the Communist party or a German-American bund. They also fill out a form to show where they worked the last sixty days. And they fill out another questionnaire that shows when they were born and if they are married or single, if they have any children, what their status is in the draft, and also they fill out a form that takes care of the income tax, and another form that goes to the Government that shows where they were born; I believe that is for the Railroad Retirement Act.

Q. Whether or not they sign a form similar to Plaintiff's Exhibit 3, which I show you? *A.* Yes, sir. They sign this form, too.

Q. Whether or not you have any conversation with these applicants in respect of remuneration? *A.* We tell these new men that they will be paid four dollars per day, provided they stay and go to work.

Q. And do—

THE COURT: What do you mean by "stay and go to work"? *A.* I mean that they finish their training period and they go on the board to go to work as regular trainmen.

THE COURT: Provided they are recommended? *A.* Yes. Provided they are turned in by the regular yard conductor.

THE COURT: Is that the arrangement in all cases? *A.* Yes. As far as I know they are all told.

THE COURT: That is the regular routine? *A.* Yes. That they will be paid four dollars a day if they stay and go to work.

Q. Were you Mr. Quincy's Chief Clerk prior to October, 1943. *A.* I believe I went to work for Mr. Quincy the last of March or the first of April, in '43.

Q. Prior to October, 1943, what did you tell these men about remuneration? *A.* They didn't receive any pay for their training period prior to October 1st.

MR. MILLER: That is all.

Coss Examination.

X-Q. (by MR. JANSEN): If I understand you correctly, Mr. Johnson, you tell these trainees that if they go to work they will get four dollars a day for the training period?

THE COURT: He says if they go to work later on.

X-Q. Can you tell me a little more in detail the exact words. Suppose I was a trainee, what would you tell me? *A.* Well, I would tell you that you would be paid four dollars a day while you was a trainee, provided you stayed and went to work. If you didn't stay and go to work you would receive no pay.

X-Q. Suppose I said, "What do you mean by 'go to work'?" *A.* Well, I tell them that that would be *after* their training period.

X-Q. I see. I expect you have had men who didn't finish their training period? *A.* Yes, sir.

X-Q. Have you ever had any that the conductor refused to approve? *A.* Yes. One, I think.

X-Q. Just one? *A.* That is all I remember.

X-Q. What happened to him? Did he stay on a little longer, or what? *A.* I believe he stayed on one crew for—I don't know whether it was twelve or fourteen days; and I went to Mr. Quincy about him. I thought he was on kind of long. And Mr. Quincy took it up with the conductor that he was working with and put him up on another job and tested him out.

X-Q. Then what happened? *A.* They had to let him go, because he couldn't do the work.

X-Q. Did you pay him? *A.* Not that I know of.

X-Q. Otherwise, all the men who finished out training were approved by the conductor? *A.* Yes.

X-Q. And those who didn't finish out the training were not paid at all? *A.* I couldn't say about that. I don't have anything to do with that.

X-Q. Do you have anything to do with the records? *A.* Well, just as the conductor turns in the slips. We attach that record to the application. After the man is qualified and put on the board they send it to Mr. Thomas's office.

X-Q. That is the only record you have of the man? On his hours worked, or the number of hours worked in a day or in a week, you have no record of that at all? *A.* We keep no records of the trainees at all.

X-Q. How much time did this man you are talking about, altogether, if you can remember, put in at the railroad before they finally let him go without paying him anything? Altogether, how much time did he put in? *A.* I couldn't say, exactly. Probably fourteen days. I would not be sure of that.

X-Q. Fourteen days? *A.* Possibly. I wouldn't be sure.

X-Q. Eight hours a day, as far as you know? *A.* As far as I know he worked with the crew eight hours a day.

X.Q. You don't remember his name? *A.* No, I don't, off-hand, remember what his name was.

MR. JANSEN: No further questions.

[Witness excused.]

PERLEY N. DYKEMAN, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by MR. MILLER): Will you state your full name and your position? *A.* Perley N. Dykeman. Conductor. Portland Terminal Company.

Q. How long have you been a railroad employee? *A.* Since August 13th, 1913.

Q. And how long a conductor for the Portland Terminal Company? *A.* I couldn't say, off-hand.

Q. Well, approximately how many years? *A.* Probably twenty-five years.

Q. Does a part of your duties consist of the instructing of so-called trainees? *A.* Yes.

Q. And have you instructed such men in the past? *A.* Yes.

Q. About how many? *A.* I don't know, exactly. Probably ten to fifteen. More or less.

Q. Under what circumstances do you first see such a trainee? *A.* Well, the trainee shows up at a designated place that I am, and he presents me with his papers and tells me he is sent in to be a trainee with me on the job. I open his papers and see what his name is and introduce him to my two brakemen. Then I tell him that I will put him with the head-end man who will instruct him to the best of his ability; and we instruct him as we go along, as we have time to do so.

Q. Whether or not his instruction consists both of observation and doing some acts? A. Observation, first.

Q. And, after a while, he gets so he does some things himself? A. He does.

Q. Whether or not he does those things in the presence of a member of the regular crew? A. Yes. In the presence of a member of the regular crew.

Q. Whether or not the trainee at any time while he is training, takes the place of any one of the regular crew? A. He does not.

Q. I understand there is always present a regular crew— A. A regular crew member. Yes.

Q. And you instruct the trainee with reference to his own safety? A. That is the first thing we tell him. To be careful of himself at all times.

Q. One of the acts is pulling pins? A. Yes. Pulling pins and throwing switches.

Q. And, while he is pulling pins, is one of the regular crew standing there watching him? A. Yes.

Q. In your opinion does the presence of the trainee, or the acts he does, speed up the work any? A. No.

Q. Why not? A. Because you have to keep him under observation at all times.

Q. Have you ever been a trainee, Mr. Dykeman? A. Yes.

Q. Did you get paid for the time you spent training? A. No.

Q. Did you think you should have been paid for that time? A. No. Not at that time.

Q. Why not? A. Because it was my ambition to be a brakeman.

Q. Why didn't you think you should get paid for the time you spent training? A. Well, it wasn't done in those days.

Q. Did you consider that you were working for the Company while you were training? A. No.

Cross Examination

Q.X. (by Mr. Jansen): How long ago was it that you were training? A. Oh, that was way back in 1913.

X-Q. How many weeks did you have to train? A. Two weeks.

X-Q. Where did you take your training? A. Right here in the Portland Terminal Company yard.

X-Q. Do trainees work full shift under you, when you have them? A. Yes.

X-Q. Do they start when you do? A. Yes.

X-Q. Do they quit when you do? A. Yes.

X-Q. And do you find that they must do the work with the rest of the crew—that they must do the work that he rest of the crew do—in order to learn it? A. Yes.

X-Q. You find that they learn best by actually performing the work? A. Yes.

X-Q. You found when you were training, I suppose, that you learned faster by actually doing the work? A. Very much so.

X-Q. What is the average time—the average length of time—required to train an employee; according to your method and experience? A. That depends upon the man's ability. The young man will pick up the business much quicker than an older man.

X-Q. What is the average? A. The average is—I keep them around five or six or seven days. Once in a while I keep them longer.

X-Q. Do you keep them as much as ten days? A. I think I kept one man eleven days.

X.Q. Did you ever turn any man down? A. No.

X-Q. You have passed all the men who trained under you? A. I passed them all.

THE COURT: These men do nothing except under supervision? *A.* That is all. I supervise, or one of the regular crew.

X-Q. Let me understand a little more clearly. There is only one man who can throw a switch? *A.* Yes.

X-Q. And when the trainee throws the switch the other crew man stands watching him? *A.* Yes.

X-Q. And that is true with reference to couplings? *A.* Yes.

X-Q. Sometimes the regular crew member might be right close at hand—a few feet; and another time he might be thirty to forty feet away? *A.* Yes.

X-Q. Sometimes you might let the trainee take the engine into a place and pull out a car while you watch him; and another time a regular crew man might go along with him? *A.* Most generally the regular crew man is with him at all times.

X-Q. But there are times he goes in without that fellow—*A.* No.

X-Q. Under your practice, in your experience, you haven't done that? *A.* No. In my experience he has always had a man with him.

X-Q. He might be on one side of the car and the regular crew man on the other side? *A.* No. There is only one side you can work on. On the engineer's side.

X-Q. How about when the clearance is pretty bad? Then you work on the fireman's side? *A.* Yes, but all crew members are on the fireman's side.

X-Q. The trainee may be close to the engine, and the head-end man may be a little further away, on the turn, and the middle-man may be even farther, and they are all relaying signals one to the other? *A.* That would depend on circumstances.

X-Q. That has happened? A. It might, once in a while.

Redirect Examination

Q. by Mr. Miller): Is the trainee ever subjected to any discipline for breaking rules? A. No.

Q. Why not? A. Because he isn't an employee.

Q. Are there any rules applicable to him? A. No.

Recross Examination

Q.X. (by Mr. Jansen): What did you mean by that? When you say a trainee isn't subjected to any discipline? A. Because he isn't.

X-Q. What do you mean by discipline? A. Well, if a man makes a mistake or anything, and you go along and tune him out for it; bawl him out for it.

X.Q. You don't bawl out the trainee? A. No.

X-Q. What other ways of disciplining do you have? A. I don't have no disciplining of trainees.

X-Q. Well, of disciplining the regular crew members, that counsel is trying to distinguish— A. I don't have no occasion to use those methods.

X-Q. What I am getting at is, Mr. Miller asked you if they were subjected to any discipline and you said no. I want to understand what you meant by "discipline." You mean you don't bawl them out? A. That is right.

X-Q. That is all you mean? A. I wouldn't say anything to a trainee if he made a mistake.

X-Q. Because he is a new man? A. Yes.

X-Q. And after he went on the spare board, you would be pretty slow to bawl him out, wouldn't you? A. Sure.

X-Q. In fact, it is the old-timers that should know about it that you bawl out, isn't it? A. That is right.

[Witness excused.]

Mr. Miller: The defendant rests.

THE COURT: Well, what do you want to do about briefs? The plaintiff has submitted a brief.

MR. PIERCE: Yes, Mr. Jansen very courteously furnished us a copy of it, but I was in Boston yesterday in the Circuit Court of Appeals and haven't had a chance to read it yet.

THE COURT: No doubt it is a very fine brief.

MR. PIERCE: It looks to me as if it was an extremely good brief. It seems to me that the facts in this matter are not particularly in dispute—

THE COURT: I guess you had better submit some memorandum of law authorities.

MR. PIERCE: I don't assume that the Government is interested in some particular instance; I assume that the Government is interested in the practice, so-to-speak.

MR. JANSEN: Yes.

[Conference, off the record.]

MR. JANSEN: I might suggest, if it please the Court, that we could stand on the brief as it is submitted now, and let counsel for the defendant submit a brief, and then we would submit a supplemental brief discussing the facts, rather than file a brief now and another brief later.

MR. PIERCE: I assume that would be a good suggestion, and as soon as Mr. Hooper can transcribe the record we will prepare a brief and furnish copies to counsel and to the Court. And I will promise to be diligent, but I would like not to have any set period fixed, if that is all right.

THE COURT: Well, do it as soon as you can, within a reasonable time.

MR. JANSEN: I would like to have an outside limit.

THE COURT: I assume that would be within three of four weeks.

MR. PIERCE: Could we make it thirty days?

THE COURT: Couldn't you make it three weeks?

MR. PIERCE: Three weeks after we get the transcript?

THE COURT: Yes.

MR. JANSEN: All right. And we will submit ours within fifteen days after receiving copies of yours.

THE COURT: Then we will adjourn.

(The taking of testimony and proceedings was then, at 3:45 o'clock, p.m., Eastern War Time, concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript of my shorthand notes taken at the time and place and in the matter therein referred to.

O.D.HOOPER,
Shortland Reporter, U. S. Courts.

Portland, Maine, 13th April, 1945.

PLAINTIFF'S EXHIBIT NO. 3.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 1

..... 19....

.....

.....

Dear Sir:

Having filed application with Portland Terminal Company for position as Yard Brakeman, and successfully passed tests as to vision and hearing, and being of required weight and height, it is agreed by me to serve for at least two weeks under instructions of a Conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of passing required examinations on the Operating Rules, the working rules and regulations as from time to time applied, and the approval of the designated officer.

Yours truly,

.....

PLAINTIFF'S EXHIBIT NO. 4.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 2

..... 19....

.....

Conductor.

Dear Sir:

The Bearer ..... is reporting to you to learn the duties of Yard Brakeman.

Please see that he is thoroughly instructed, particularly in regard to flagging, receiving and communicating signals, block signal operation, handling switches, and overhead and side clearances.

Please keep him with you for two weeks, and at the end of that time fill out attached blank, Form No. 3, and return to me.

Yours truly,

.....

Superintendent.

PLAINTIFF'S EXHIBIT NO. 5.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 3
(October 31, 1942)

(Mr. J. L. Quincy)

.....

Dear Sir:

Mr. (Leo E. Cyr) has worked under my instructions as to the duties of Yard Brakeman on dates as follows: (Oct. 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31).

I have instructed him as ordered relative to the duties of a Yard Brakeman, particularly in regard to flagging, receiving and communicating signals, block signal operation, handling switches, and have cautioned him in regard to looking out for overhead and side clearances.

I would .... recommend him for the position of Yard Brakeman.

Yours truly,

(AMBROSE MCMILLAN),
Conductor.

I have been instructed by Conductor (McMillan) fully as above and understand.

(LEO E. CYR).

PLAINTIFF'S EXHIBIT NO. 6.

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY

Portland, Maine.
(Jan. 4, 1943)

Report of Reviewing Board of the Portland Division and Portland Terminal Company on application of (Leo Ernest Cyr), who is an applicant for employment as (yard brakeman) at (Rigby-Portland).

This above applicant has been before the Board for final inspection and we find him (or her) acceptable for employment.

(F. O. WOOD)
(H. J. KENNEDY)
(H. R. WITHEE)

(M. F. Rolfe) For approval (FOW)
Approved (M. F. Rolfe), *Assistant to General Manager.*

PLAINTIFF'S EXHIBIT NO. 7.

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY

Portland, Maine.
October 1, 1943.

Mr. W. E. Easler, General Chairman,
Brotherhood of Railroad Trainmen,
91 Kelsey Street, South Portland, Maine.

Dear Sir:

Our talk of September 28th—

Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.

Payment to be made if and when the Student has qualified, is accepted for and takes employment.

If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached.

Very truly yours,

(sgd) M. F. ROLFE,
Assistant to General Manager.

Acknowledged:

W. E. EASLER (s)
General Chairman, Brotherhood of Railroad Trainmen.

PLAINTIFF'S EXHIBIT NO. 8.

Yard Brakemen Employed by Portland Terminal Co. Jan. 1, 1942, to Mar. 20, 1945. Not now in service.

1942

Baird, Martin William
Brackett, Percy W.
Connolly, John P.
Cyr, Leo Ernest
Daniels, Kenneth M.
Doiron, William J., Jr.
Donnelly, William H., Jr.
Faye, Stanley Roland
Foster, Norman J.
Giberson, Donald A.
Hayes, James
Dearborn, Joseph J., Jr.
Jordan, Edward F., Jr.
Lee, James W.
London, Harold G.
McCaffrey, Charles H.
Molbeck, Albert C.
Morrison, Benjamin H.
Mosley, Carroll A. L.
Schoen, Herman J.
Smith, Merle S.
Viens, Thomas W.

Jan. 1, 1943, to Sept. 30, 1943

Anderson, Cornelius Tarbox
Bellis, Charles Edward
Brown, Myrl Webster
Clement, John Alfred
Dimond, James E.
Dube, O'Nues Geo. Donatuse
Guest, James A.
Gagne, Lawrence L.
Hamilton, George F.
Hendrick, Leslie J.
Hillman, John H.
Howard, Fred G.
Leclerc, Cyril Wilfred
Leighton, Eugene H.
Leighton, Justin S.
Lester, James B.
MacDonald, Charles F.
Marsh, John W.
McKinney, Fred W.
Michaud, Philip J.
Miller, Lee Roy
Moffatt, Ralph J.
Noyes, Kingman P.
Putnam, Cecil I.
Quimby, George G.
Reed, Hollis B.
Richardson, Austin R.
Russell, Alton R.
Snow, Roy E.

Oct. 1, 1943, to Dec. 31, 1943

Andrews, John F.
Creeden, John D
Dudley, Chas. W.
Gray, Noel Caleb
Howison, Mark A.
McEachearn, James G.
Moores, William T.
Mutch, Morris A.
Smith, Christian P.
Snyder, William H.
Townsend, Clarence W.
White, Adrian H.
Wright, Kenneth L.

1944

Alden, Ernest Henry
Beane, Fred W.
Boure, John N.
Bowser, Joseph C.
Bursis, LeRoy, Jr.
Donavan, Edward J.
Englehardt, Fred L.
Flink, Oscar B.
Fuller, Girard O
Hanning, William A.
Hanson, Clyde C.
Hayes, Arthur H.
Holt, William B.
Jordan, Robert Clinton
Lane, Amos O.
LaValley, Edward Henry
Lecerte, Wilfred T.
Masse, Joseph E.
McCoy, George M.
Mongeau, Gordon K.
Oldham, Roy E.
Parker, Charles M.
Parker, Thomas E.
Perrow, Leon Theodore
Sansone, Anthony J.
Sherwood, Waldo F.
Sullivan, Donald E.
Sullivan, Francis
Taylor, Sherman L.
Theriault, Donald A.
Tompkins, S. M
Towne, Wendell C.
Walden, Courtney A.
Ward, Benjamin L.
Wilbur, Charles D.
Wilson, Stanley H.

1945

Stevens, Kenneth W.

PLAINTIFF'S EXHIBIT NO. 9.

Yard Brakemen Employed by Portland Terminal Company Jan. 1, 1942, to Mar. 20, 1945. Now in service.

1942

Thomas, Oramel S.
Conner, Russell H.
Finney, Joseph W.
Oates, Thomas E., Jr.
Botsford, Charles C
Kimball, Norman W.
Smith, Clarence H.

1943

Barnes, Charles
Giacullo, Angelo L.
Judd, Albert W.
Pryor, George E.
Duncan, Arthur R.
Dinsmore, Walter F.
Thompson, Bennett E.
Presnell, Robert G., Jr.
Yula, Rudolph S.
Sawyer, Urban L.
Johnson, Richard J.

1944

Currier, S. L.
Seavey, Linwood O.
Noble, James E.
Inman, I. H.
McKeen, Norman B.
Hunter, Hartford N.
Smith, Walter G.
Bouffard, Joseph A.
Foley, Robert W.
Foss, Samuel W
Newcomb, Geo. E.
Redlon, William F.
Hayes, Stanley B.
Lord, Daniel J.
Plummer, Cecil H.
Anderson, James W.
Wallace, Richard J.
McCordie, Wilmot N.
Huff, Frank N.
Rollinson, James T.
Carroll, Joseph T.
Landry, Harry P.
McCalmon, Irving F.
Oakes, John G.

1945

Herron, James F.
Gilman, Rene
Desmond, William F.
McMahon, Henry E.

Bernier, Arthur
Larlee, Hayden L.
Farrell, Daniel P.
Emack, Donald A
Kinney, Preston O.
Graney, Arthur W.
Flynn, George J.
Taylor, Frederick W.
Kemp, William J., Jr.
Marston, Osman C.
Gilman, Harry W.
Eaton, Frederick
Kearns, Robert F.
Geyer, Erich M.
Henderson, Wm. E.
Carroll, Raymond
Breyer, Warren S.
Pickering, Herbert E.
Herman, John
Cloutier, Romeo C.
Caswell, William F.

PLAINTIFF'S EXHIBIT NO. 10.

Portland Terminal Yard Brakeman Applicants who started striking period and did not complete or accept employment.

1942

Patrick E. Geary
Bertram J. D. Fairweather
Raymond O. Delcourt
Floyd A. Mann

1943

Hans R. Larsen
Stuart A. Vittum
James P. Collins
Henry P. Woodbury
Keith R. Carle
Harry J. Fox

1944

Robert D. Davis
Maurice L. Carter
John L. Tozie
Ludger Smart
Joseph A. Peterson
Howard L. Clark
Joseph W. Widor

1945

Marshall S Cram
Calvin F. Bickford
Robert B. Haney

[Title omitted.]

OPINION OF THE COURT
18th June, 1945.

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a)(2) and 15 (a)(5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

FINDINGS OF FACT

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners". If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad, however, as the trainee does not displace any member of the regular crew at the time. Rather,

it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

The length of the training period, if completed, depends upon the aptitude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee.

While training, the learner is expected to be present with the crew to which he has been assignd during working

hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such.

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business.

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows:

> "Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.
>
> Payment to be made if and when the Student has qualified, is accepted for and takes employment.
>
> If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point.

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11(c) covering the trainees.

Conclusion of Law

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of pay-

ing trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling* v. *Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in *Walling, Adm., v. Nashville, Chattanooga and St. Louis Ry.*, recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.

[Title omitted.]

JUDGMENT

June 20, 1945.

PETERS, J. In accordance with the opinion of the Court handed down June 18, 1945, it is

Ordered, that the Complaint in the above entitled case be dismissed.

JOHN A. PETERS,

Judge, U. S. District Court.

[Title omitted.]

NOTICE OF APPEAL

[Filed July 6, 1945.]

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above styled action, hereby appeals to the United States Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on June 20, 1945.

Dated July 6, 1945.

(s) DOUGLAS B. MAGGS,
Solicitor,
(s) ARCHIBALD COX,
Associate Solicitor,
(s) GEORGE H. FOLEY,
Regional Attorney,
(s) GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING,
Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.
or
Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

[Title omitted.]

STATEMENT OF POINTS

[Filed July 6, 1945.]

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellant in the above-entitled action, now designates the points on which he will rely in the prosecution of his appeal from the judgment entered in this action on June 20, 1945;

1. That the court erred in ruling that trainees for the jobs of brakemen at defendant's railroad terminal were not employees of the defendant within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs.

2. That the court erred in denying the plaintiff an injunction as prayed in his complaint.

Dated July 6, 1945.

DOUGLAS B. MAGGS,
Solicitor,
ARCHIBALD COX,
Associate Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.

or

Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

I., George H. Foley, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby certify that on the 6th day of July, 1945, a copy of the foregoing statement of points was mailed to Leonard A. Pierce, Esquire, and Edward W. Atwood, Esquire, attorneys of record for Portland Terminal Company in Government franked envelopes to 465 Congress Street, Portland, Maine, the same being their last known address.

GEORGE H. FOLEY.

[Title omitted.]

DESIGNATION OF RECORD

[Filed July 6, 1945.]

To: The Clerk of the District Court of the United States for the District of Maine

In accordance with Rule 75(a) of the Federal Rules of Civil Procedure, you are requested to make a transcript of the record in the above styled action, pursuant to the notice of appeal filed therein, said transcript of record to contain the following:

1. Plaintiff's complaint.
2. Defendant's amended answer.
3. Complete transcript of the proceedings at the trial beginning on April 5, 1945, including all exhibits.
4. Opinion of the court of June 18, 1945.
5. Judgment dated and entered June 20, 1945.
6. Notice of appeal, with date of filing.

7. The statement of points.
8. This designation.

You are requested to prepare said transcript of record in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States and to transmit the same to the Clerk of the United States Circuit Court of Appeals for the First Circuit within 40 days from the date of the notice of appeal, or within such extended period, not exceeding 90 days from said date as may be ordered by the District Judge.

Dated July 6, 1945.

(s) DOUGLAS B. MAGGS,
Solicitor,
(s) ARCHIBALD COX,
Associate Solicitor,
(s) GEORGE H. FOLEY,
Regional Attorney,
(s) GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.
or
Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

I, George H. Foley, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby

certify that on the 6th day of July, 1945, a copy of the foregoing designation of record was mailed to Leonard A. Pierce, Esquire, and Edward W. Atwood, Esquire, attorneys of record for Portland Terminal Company in Government franked envelopes to 465 Congress Street, Portland, Maine, the same being their last known address.

GEORGE H. FOLEY.

[Title omitted.]

STIPULATION

[Filed August 15, 1945.]

It is stipulated in the above entitled cause as follows:

Plaintiff's original exhibits 1 and 2 and defendant's original Exhibit A need not be made a part of the printed record on appeal, defendant's original Exhibit A need not be sent to the United States Circuit Court of Appeals for the First Circuit, and appellant's designation of the record on appeal may be considered as amended accordingly.

WILLIAM S. TYSON,
Acting Solicitor,
JETER S. RAY,
Assistant Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
HARRY A. TUELL,
Attorney,
U. S. Department of Labor,
Attorneys for Appellant.
E. SPENCER MILLER,
Attorney for Appellee.

[Title omitted.]

MOTION AS TO ORIGINAL PAPERS AND EXHIBITS

[Filed August 15, 1945.]

Now comes the appellant in the above entitled cause and moves that plaintiff's original exhibits 1 and 2 which were introduced in evidence at the trial of said cause be sent to the United States Circuit Court of Appeals for the First Circuit in lieu of a copy thereof upon such terms as this Court may by its Order prescribe.

WILLIAM S. TYSON,
Acting Solicitor,
JETER S. RAY,
Assistant Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
HARRY A. TUELL,
Attorney,
U. S. Department of Labor,
Attorneys for Appellant.

[Title omitted.]

ORDER AS TO ORIGINAL PAPERS AND EXHIBITS

[Filed August 15, 1945.]

This cause came on this day to be heard on the motion of appellant that certain of the original exhibits introduced in evidence at the trial of this cause be sent to the United States Circuit Court of Appeals for the First Circuit in lieu of a copy thereof, and it appearing to the court that such exhibits are not readily susceptible to be made a part of the printed record;

It is ordered that plaintiff's original exhibits 1 and 2 need not be copied in the printed record of the testimony of the witnesses given at the trial of this cause but that the same shall be preserved by the Clerk of this Court until after the filing of briefs by appellant and appellee in the United States Circuit Court of Appeals for the First Circuit, at which time said original exhibits shall be forwarded to the Clerk of the United States Circuit Court of Appeals for the First Circuit, subject to its further orders in regard thereto. Pending the forwarding of said original exhibits to the United States Cicuit Court of Appeals for the First Circuit, they may be inspected and copied by the attorneys for appellant and appellee in whatever respects deemed material by them.

JOHN A. PETERS,
Judge, U. S. District Court.

Appellee assents hereto, 15 Aug. 1945.

E. SPENCER MILLER,
Attorney for Appellee.

[MEMORANDUM: A motion for an extension of time for filing record on appeal and an order extending time to August 15, 1945, are here omitted. A. I. CHARRON, *Clerk.*]

CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

I, Eben Winthrop Freeman, Clerk of the aforesaid Court, hereby certify that the foregoing is a true copy of the matter designated by the parties as constituting the record on appeal in the case entitled,

No. 230, Civil.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
PLAINTIFF, APPELLANT,

vs.

PORTLAND TERMINAL COMPANY,
DEFENDANT, APPELLEE,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court at Portland in said District, this twenty-first day of August, A.D. 1945.

[SEAL] EBEN WINTHROP FREEMAN,
Clerk.

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On March 5, 1946, this cause came on to be heard, and was fully heard by the court, Honorable Calvert Magruder, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on April 29, 1946, the following opinion of the court and dissenting opinion were filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4111. October Term, 1945

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, PLAINTIFF, APPELLANT

v.

PORTLAND TERMINAL COMPANY, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Maine

Before MAGRUDER, MAHONEY, and WOODBURY, JJ.

William S. Tyson, Acting Solicitor, Jeter S. Ray, Assistant Solicitor, George H. Foley, Regional Attorney, George W. Jansen, Supervising Attorney, Harry A. Tuell, Senior Attorney, Morton Liftin, Attorney, U. S. Department of Labor for Appellant.

E. Spencer Miller, for Appellee.

Opinion of the Court

April 29, 1946

MAHONEY, J. The district court denied an injunction sought by the Administrator of the Wage and Hour Division of the United States Department of Labor against the defendant for alleged violations of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act and from that decision the Administrator has appealed. This case calls upon us to determine whether persons who are engaged in training for positions with the defendant company as yard brakemen are "employed" by the company or are "employees" of the company during the training period within the meaning of § 3 (e) and (g) of said Act. If these so-

called "trainees" or "learners" are "employees" then the defendant must pay them the minimum wages and keep the records required by §§ 6 (a) and 11 (c) of the Act.

Because of the disposition we make of the case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce.

The defendant operates a railroad terminal at Portland, Maine, and employs yard crews in the operation of its facilities. For some years it has been the custom of the defendant and other railroad companies to require all inexperienced applicants for jobs as yard brakemen to go through a training period. Prospective workers are required to file a formal application for employment, to take an eye test and undergo, at their own expense, a physical examination by a physician designated by the company. If the applicant passes these examinations he is assigned to a conductor who is in charge of a yard crew of three regular men and he goes through a training period. The trainees are given an opportunity to observe the type of work they will do when and if they become regular brakemen. Under supervision of regular crew members they are gradually permitted to do more and more of the work which the regulars do until such time as the conductor deems them competent to serve without supervision. If a trainee finishes his training period and is certified by the conductor as competent to carry out the duties of a brakeman, his name is placed "on the board", which means that he is eligible for employment as a regular. Before October 1, 1943, the trainees were not paid during the training period. Since then the company has paid each trainee $4.00 a day for each eight hour day of that period if he finishes his training and is placed "on the board".[1] If he does not complete his training period or is not certified as competent, he receives nothing for the time he has put in. The trainees are informed of these provisions in regard to compensation before they are permitted to start their training. The length of the training period required depends upon the aptitude and skill exhibited by the individual trainee and averages about seven or eight days.

[1] On October 1, 1943, the defendant wrote to the Chairman of Brotherhood of Railroad Trainmen, in conformity with an agreement between it and the Brotherhood. This letter follows:

"Our talk of September 28th—

"Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.

Payment to be made if and when the Student has qualified, is accepted for and takes employment.

If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

Soon after this agreement, The Company advertised in newspapers for the services of trainees on these terms.

There is no evidence that this practice will be continued beyond the "present Emergency". It does not appear that the defendant is under any contractual obligation to continue it.

The maximum length of the period is two weeks. The application for employment which is signed by the prospective trainee states: "It is agreed by me to serve for at least two weeks under instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer." During the period of training, the trainee is expected to be present with the crew to which he has been assigned during the working hours, which are normally eight hours a day, but are sometimes longer. As a matter of practice, the trainee is not required to pass any examination on the rules of the company, though he is required to copy those rules into a notebook.

The court below found that the work of the trainee "is of no immediate advantage to the Railroad * * * as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited." It found, however, that the training program enables the railroad to obtain "a pool of qualified workmen to draw upon * * *". It also found that the trainee "is not subject to the rules or discipline applicable to an employee and is not considered such".

The finding of the district court that the defendant does not pay the trainees the minimum wage required by § 6 of the Act aside from the $4.00 allowance and does not maintain the records required by § 11 (c) is not in dispute. Thus the sole question presented to us is whether the trainees here under consideration are "employees" within the meaning of the Act, for if they are, the injunction sought by the Administrator should have been granted.

Section 3 (d) of the Act defines the word "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *". Section 3 (e) defines an employee as "any individual employed by an employer" and Section 3 (g) tells us that " 'Employ' includes to suffer or permit to work". Under these definitions, an employee is any individual whom an employer suffers or permits to work. If these definitions were the sole criteria for determination, then it would seem that these trainees are employees, for they are certainly permitted to work on the premises of the Portland Terminal Company under any common definition of the word work. But did Congress intend to include in the classification of employees all persons whom an employer suffers or permits to work? Did Congress intend to compel an employer to pay the minimum wage required by the Act to a person who voluntarily and purely for

his own benefit seeks to labor under an employer's control? Suppose an author desired to work in the train yards in preparation for writing a novel and requested the Portland Terminal Company to give him an opportunity to do so. Would the Terminal Company be obligated to pay him the minimum wage, when the author neither sought nor expected pay? It hardly seems that Congress intended the Act to cover such an individual. And yet a literal construction of the definitions in the Act would compel the Company to pay the author the minimum wage, for if he pulled any pins or threw any switches or coupled any cars, he would be working and the company would be permitting him to work.

A number of cases have arisen where an employee (or an independent contractor) hires an individual to work on the premises or with the property of his employer with the knowledge of the latter. At least three Circuit Courts of Appeals have held that the sub-employee was not an employee of the primary employer within the meaning of the Act even though that employer suffered or permitted him to work. Walling v. Sanders, 136 F. (2d) 78 (C. C. A. 6th, 1943); Helena Glendale Ferry Co. v. Walling, 132 F. (2d) 616 (C. C. A. 8th, 1942); Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5th, 1941).

There is no question but what this statute should be liberally construed for it is remedial and humanitarian legislation. Fleming v. Palmer, 123 F. (2d) 749, 762 (C. C. A. 1st, 1941) cert. den. 316 U. S. 662. And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 323 U. S. 360, 362 (1945). But we do not believe that Congress intended to give to the term "employee" the expansive scope that a literal construction of the words "suffer or permit to work" would compel. We cannot infer that Congress intended the absurdities that such a construction would breed.

In deciding that the trainees were not "employees" the district court followed the conclusion and reasoning of Walling v. Jacksonville Terminal Co., 148 F. (2d) 768 (C. C. A. 5th, 1945) which we have found to be the only appellate court decision similar in factual situation to the case at bar. That case involved trainees for engine and switching service with the Jacksonville Terminal Company. The nature of the training program of that company was similar to the program of the Portland Terminal Company. However, as stated in that case, "A trainee (for the Jacksonville Co.) has no regular time to report or hours for training, though generally he joins a crew at the beginning of their shift and exhibits his permit to receive instruction. He is free to select such time each day as best suits his convenience, and he frequently appears after completing his day's work elsewhere". The trainee for the Jacksonville Company was required to study rules and

regulations and pass an examination thereon before he could be put on as a regular employee. And the trainee for that Company was not entitled to any compensation even though he successfully completed his training and was assigned to a regular job. The court there found that "the company did suffer the trainee to work on its premises and with its appliances" but because "the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired", it held that he was not employed by the Terminal Company within the meaning of the Act. The fundamental reasoning of the court stemmed from its decision in Bowman v. Pace, supra, where it said: "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act." We do not mean to indorse this test as the sole criterion for determining whether the relationship of employment exists. But we do feel that it is at least one very important element to be taken into consideration.

The fact that the defendant in the instant case made a contingent promise to pay the trainees $4.00 a day and advertised in newspapers perhaps makes this case a stronger one for the government. In the Jacksonville Terminal case the court commented that "If such employees should be in demand, so that the Company were seeking trainees instead of trainees seeking permits to train, a different arrangement might result under which training with pay might be agreed on. Apparently that is not now the case; certainly that is not the present basis of the training." We do not believe that the possibility of payment for the work which exists in the case before us is determinative. The promise was contingent. There was no absolute assurance that the trainee would receive payment for his work nor was he absolutely entitled to wages. All that is indicated by the promise to pay and the advertisement requesting trainees is that the company had a more immediate need for trainees than previously in order to maintain a pool of qualified workers. They do not indicate that the services of the trainee were primarily or necessarily beneficial to the company. Hence we feel that the principles set forth in the Jacksonville Terminal Co. case are applicable here. Even an absolute promise to pay the trainees a specific sum per day regardless of whether they completed the training period and were found competent was not considered sufficient to make the trainees "employees". Walling v. Nashville, Chattanooga & St. Louis Ry., 60 F. Supp. 1004 (M. D. Tenn. 1945).

In Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161, 163–166 (1945) and Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123, 321 U. S. 590, 598 (1944) the Supreme Court set for the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business. In those cases, the court held that miners while traveling from the mine portals to their station of work in the mines and back were working within the meaning of the Act so as to be entitled to the minimum wages for the time spent in so traveling.

At least one of the three requirements set forth by the Supreme Court is not satisfied in the instant case. Of course, the trainees underwent physical and mental exertion and it may be that this exertion was "controlled or required" by the defendant, but we do not believe that it was "pursued necessarily and primarily for the benefit" of the defendant. In the case of many trainees, the company received no benefit whatsoever for they terminated their relationship before coupleting the training period. As to those employees the training period was certainly a burden to the company. The company has no guarantee that a trainee will complete his training and ultimately accept employment if it is offered to him. There can be no question, however, but what the company did receive some benefit from the existence of its training program. Without such a program, it would not be long before the company would find itself lacking capable operatives. But the test set forth is not one of the benefit to the company. The test is whether the work necessarily or primarily benefits the company. We cannot conclude that the company and not the trainee received the principal benefit of the training program or that the work of a trainee would inevitably benefit the company.

The Administrator urges that § 14 of the Act[2] assumes that learners are "employees". That section gave the administrator discretionary power to "provide for (1) the *employment* of learners * * *" at wages lower than the minimum wage provided for in Section 6. (Italics supplied.) The very wording of Section 14, however, presupposes employment. If a learner is not "employed" within the meaning of the Act, then the Administrator has no authority to make regulations in regard to him. And we

[2] Sec. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

have already concluded that these learners are not employed. This interpretation of Section 14 is the same as that rendered in the Jacksonville Terminal Co. case and The Nashville, Chattanooga & St. Louis Railway case.

The judgment of the District Court is affirmed.

MAGRUDER, J. (dissenting). These "trainees" are required to report for duty at specied hours, and remain on the job during the entire working shift of the regular crew, subject to all the hazards of the employment. They are engaged in mental and physical exertion under the direction and control of a supervisory employee and are gradually broken in to the actual performance of the various routine tasks of yard brakemen. It does not seem to me to be important that the trainees are ordinarily extra men on crews. See Brown v. Chicago, R. I. & P. Ry. Co., 315 Mo. 409, 286 S. W. 45 (1926), where a "student fireman" serving on a locomotive along with a full engine crew was held to be an employee within the meaning of the Federal Employers Liability Act. See also Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309 (1914). In view of the recognition in the opinion of the court that the trainees here involved "are certainly permitted to work on the premises of the Portland Terminal Company under any common definition of the word work", I think we are obliged by the comprehensive statutory definitions to hold the trainees to be employees within the meaning of the Fair Labor Standards Act. Cf. Tennessee Coal, Iron & R. R. Co. v. Muscoda Local, 321 U. S. 590 (1944); National Labor Relations Board v. Hearst, 322 U. S. 111 (1944). Walling v. Sanders, 136 F. (2d) 78 (C. C. A. 6th, 1943), and similar cases, are not controlling, for there the men involved were admittedly employees, and the only question was, who was their employer? Here, if the trainees are employees, Portland Terminal Company is without doubt their employer. If the Terminal Company had followed the practice of putting approved applicants on the payroll immediately as yard brakemen, but had assigned them for the first week or two as extra men accompanying the regular crews to familiarize themselves with the layout of the yard and gradually to undertake performance of the routine tasks under supervision, such new men, I suppose without any question, would be deemed to be employees. Calling them "trainees", instead of yard brakemen on trial or probationary employment, could hardly work a change in their status.

It is of no consequence that during their early training period the trainees may be of little immediate benefit—indeed, may be a "disadvantage"—to the company. This may often be the case with learners or beginners. For instance, inexperienced operators of looms in a textile mill may spoil goods, get the machines out

of order, have a low production rate, may be in fact an economic liability to the employer, until skill and facility are acquired. Nonetheless, for better or for worse, they are employees. This was well known to Congress when it enacted the Fair Labor Standards Act. It recognized that in certain employments it might be appropriate to allow the hiring of learners, or "trainees", at less than the generally applicable minimum wage rates. But instead of granting to the employer an outright exemption from the wage provisions of the Act during a specified training period (as was proposed, 83 Cong. Rec. 7389, 7391, 7393), Congress required the payment of the statutory minimum wage to all employees, including learners, unless and until the employer, under regulations to be prescribed by the Wage and Hour Administrator, should obtain a special certificate authorizing the employment of learners at stated wage rates less than the statutory minimum and under such other conditions as the Administrator might prescribe. I think the court's decision in the case at bar constitutes a serious impairment of the administrative safeguards contained in Section 14 of the Act.

On the same day, to wit, April 29, 1946, the following judgment was entered:

Judgment

April 29, 1946

This cause came on to be heard March 5, 1946, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 29, 1946, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

(S) ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on May 15, 1946, mandate issued.

Clerk's certificate

I, Roger A. Stinchfield, Chief Deputy Clerk of the United States Circuit Court of Appeals for the First Circuit, and, during the temporary absence of the clerk, in charge of the affairs of the clerk's office of said court and custodian of its files and records, certify that the foregoing pages numbered 1 to 145, inclusive, contain and are a true copy of the record and all proceedings to, and including, July 13, 1946, in the cause in said court numbered and entitled, No. 4111, L. Metcalfe Walling, Administrator of the

Wage and Hour Division, U. S. Department of Labor, Plaintiff-Appellant v. Portland Terminal Company, Defendant-Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this thirteenth day of July, A. D. 1946.

[SEAL] (S) ROGER A. STINCHFIELD,
Chief Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1946

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 26 1946
CHARLES ELMORE CROPLEY
CLERK

Nos. 335 and 336

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PORTLAND TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 335

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 336

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PORTLAND TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour

Division, United States Department of Labor, prays that writs of certiorari issue to review the judgments of the Circuit Courts of Appeals for the Sixth and First Circuits entered in the above cases on June 1, 1946, and April 29, 1946. The two cases present substantially the same question. Hereinafter we shall refer to the case in the Sixth Circuit as the "*Chattanooga* case" and cite the record in that case as "CR". The case arising in the First Circuit will be referred to as the "*Portland* case" and the record will be cited as "PR".

OPINIONS BELOW

The opinion of the district court in the *Chattanooga* case (CR. 365–371) is unreported. The majority and dissenting opinions of the Sixth Circuit Court of Appeals (CR. 378–382) are unreported. The opinion of the district court in the *Portland* case (PR 123–126) is reported at 61 F. Supp. 345. The majority and dissenting opinions of the First Circuit Court of Appeals (PR. 135–142) are reported at 155 F. 2d 215.

JURISDICTION

The judgment of the Circuit Court of Appeals in the *Chattanooga* case was entered June 1, 1946 (CR. 378). The judgment of the Circuit Court of Appeals in the *Portland* case was entered April 29, 1946 (PR. 142). The jurisdiction of this Court in both cases is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether persons being trained for jobs with respondents by performing the actual duties and functions of the jobs under the supervision of the regular employees are employees of the respondents within the meaning of the Fair Labor Standards Act during the period of training.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.
>
> SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *.

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices * * * under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, * * *.

STATEMENT

Respondent in the *Chattanooga* case operates an interstate railway system furnishing the usual passenger and freight service and maintaining the customary shops, terminals, offices, and general railway facilities (CR. 3, 18). During the period covered by the complaint, it has required all persons seeking employment with it as switchmen, firemen, brakemen, clerks, stenographers, messengers, callers, and porters, to undergo a training period as a condition to going on the employment rolls (CR. 73). Before going through the training these workers must file formal applications for employment, furnish references, take a physical examination, and, in some occupations, must sign a release designed to protect respondent against claims for injuries (CR. 80, 149, 242). The train service employees (switchmen, firemen and brakemen) are then assigned to serve as "cubs" with the regular crews (CR. 81). Ordinarily the trainees do not displace

any member of the regular crew (CR. 367). It is respondent's policy not to hire a "cub" unless it recognizes that it is going to need him for a regular by the time his "cubbing" period is completed (CR. 59, 65, 66, 128).

Each new worker is required to cub under the supervision of a regular employee until he has worked on all of the various jobs which are performed by regular employees in his occupation. Thus a switchman must become acquainted with twenty-one separate jobs (three shifts and seven locations) (CR. 29–30); he is assigned to the first shift for four or five days, to the second shift for three or four days, and to the third shift for three or four days, working with the regular crew on each of the seven jobs on each shift (CR. 30, 31). A yard fireman is required to cub on at least four different jobs before being placed on the employment roll: firing the Diesel switch engine, firing the steam switch engine, hostler helper's job in the shop, and hostler helper's job on the outside (CR. 178). Over-the-road firemen must make fifteen or twenty runs, including "so many trips in local service, local freight, so many trips in fast freight, so many trips on passenger, and hostler a couple of days" (CR. 228, 95). Brakemen are also given a schedule of runs which includes all of the runs in each of the divisions (CR. 92, 242–245).

The cubs work the same hours (frequently from 12 to 16 hours a day—CR. 38, 66, 186, 246, 253) and perform the same functions as the regu-

lar employees (CR. 179, 186, 215–216, 252, 256). The cub switchmen throw switches, couple and uncouple cars, give signals, help classify trains, set hand brakes, and cut and connect air hose (CR. 32, 187, 215); cub firemen switch valves, keep a watchout for safety, shovel coal, make engines ready for the road, test them, fill the sand dome, coal bin and water tank, get the fire in proper condition, etc. (CR. 178, 179, 232); cub brakemen perform switching, signalling, coupling and uncoupling of cars (CR. 244, 252, 256). In addition, cub brakemen when traveling between stations, whether a run is on their schedule or not, are expected to assist in loading and unloading freight (CR. 94, 244, 248, 249). The cubs do not displace the members of the regular crews under whom they work; the latter are responsible for seeing that the work is properly done and, of course, are paid their customary wages.

The length of the cubbing period varies depending on the occupation and on respondent's need for regular workers (CR. 41, 213). Generally, the training period ranges from ten to thirteen days for switchmen (CR. 30, 31) to as long as six to seven weeks for the over-the-road firemen (CR. 227). As the general yardmaster stated, however, it takes only a few minutes for a cub switchman to learn to throw a switch or couple or uncouple a car (CR. 33, 34). A worker testified that a cub brakeman takes all of "fifteen to

twenty minutes" to "catch on to coupling and uncoupling trains, throwing switches" and performing the usual tasks of a brakeman (CR. 252). What the cubs are really supposed to learn is, in the case of the switchmen and the yard firemen, the lay-out of respondent's yard and the signals peculiar to respondent's operations (CR. 33–36, 53, 62, 180–181), and, in the case of the over-the-road firemen and brakemen, the road on which they must travel as regular employees (CR. 97, 236–237, 247–253). Indeed, new workers must go through a "training period" even if they have already had experience in the particular occupation (R. 205–206). For example, men with experience in firing and even already employed as regular firemen were nevertheless required to cub in order to learn respondent's road when respondent transferred them from one division to another (CR. 97–98).

Up to the time of suit, respondent required "cubbing" or "posting" under a regular employee even by clerks, stenographers, messengers, callers, and porters (CR. 109, 126, 131, 140). At the Chattanooga yard, new yard clerks and office clerks worked without pay eight hours or more a day, five to seven days a week, for periods ranging from three to eight weeks (CR. 19, 126, 139). Frequently, these clerks worked twelve or fourteen hours and in at least one instance twenty-four hours a day (CR. 139). Before he was paid, the clerk was expected to "work on each one of the

shifts" and on several different clerical jobs (CR. 106, 129–130, 158). The clerks followed the same routine as regular employees. They filled out train sheets, wrote up bills, itemized bills and did "billing and expensing and checking freight" (CR. 115, 107, 129, 131, 134). In addition, they checked way bills in the freight cars and made out way bills and expense bills (CR. 116). The clerks received their instructions from the supervisor, but after the first two days, the cub clerk did the checking himself (CR. 116). The cub "did the writing in the book" (CR. 131). The regular clerk simply helped him (CR. 116).

Stenographers, graduated from business college and with years of experience, were required to work five or six days without pay until they became familiar with respondent's special office routine (CR. 153).

"Callers," whose duties are to call train crew members before time for their departure, were required to work from one to three days without pay. The chief clerk explained, "We send around with him another caller to learn him the various cab tracks and how to find the various places in the yard that the cabooses might be located on, where their boarding places are, their telephone numbers, how to read these registers, how to keep the train numbers marked up with the crews in their proper order" (CR. 154–155).

Messengers were required to work for "about three days" without pay while they "learn the

various offices throughout the town" and to distribute mail "without getting it mixed up or misplaced" (CR. 155).

"As a rule," porters were paid "by the third day" (CR. 152). They worked for two days without pay. The chief clerk stated, "there is quite a bit of routine in connection with his work, sweeping up two floors, keeping the dust off the records, washing out the lavatories, taking out cuspidors and running a few little errands for the operators" and that it sometimes took him a week to teach them "how to use a broom" (CR. 151–152).

Prior to December 1943, cubs received no pay whatsoever for their work (CR. 48). On December 1, 1943, because of the manpower shortage created by the war, the company adopted the policy of paying cub switchmen, firemen and brakemen $5 a day "as an inducement or incentive" to obtain workers (CR. 75). Two weeks later, respondent issued instructions that cubs were to be paid only if they were subsequently put on the rolls as "regular" employees (CR. 312). Workers who did not become "regular" employees received no compensation whatsoever for their services. Respondent's witnesses testified that in January 1945, after this suit was instituted, respondent adopted the practice of paying all cubs $5 a day,[1] whether or not they were ulti-

[1] This was the maximum compensation paid, irrespective of the number of hours worked during the day. Thus, if em-

mately hired as "regular" employees (CR. 313). It is clear, however, that this practice was a temporary expedient growing out of the war emergency (CR. 74, 75, 78, 304). Respondent continues to deny that the trainees are employees and still asserts its right to withdraw the payments at any time (CR. 83, 84).

With respect to the clerks, messengers, callers and office porters, respondent's answer avers that "when the Fair Labor Standards Act became effective" it "recognized the possibility" that these workers "on rare occasions might perform a beneficial service for defendants at the same time that the regular employees were doing a similar but not identical assignment", and "proceeded to treat such applicants as if subject thereto" (CR. 18–19). It is admitted, nevertheless, that the practice of not paying these workers continued at least at the Chattanooga yard until suit was brought in November 1944, but it is contended that this was done "without knowledge of [the] Management" (CR. 19). In any event, respondent continues to contend that it does not "employ" these workers while they are training, that any money paid is not compensation for employment, and that it is under no duty to comply with the Act in the

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ployees worked more than 12½ hours, the rate of pay was less than the statutory minimum. The record shows that some employees worked as many as 16 hours without additional compensation (CR. 186–189).

future with respect to any of them (CR. 151, 175, 304).

Respondent in the *Portland* case operates a terminal facility at Portland, Maine, serving several interstate railroads (PR. 20–21). Among its employees are yard brakemen who undergo a training period substantially like that given by respondent in the *Chattanooga* case (PR. 26–27, 38–39).

Prior to October 1, 1943, these Portland Terminal workers were required to undergo the entire training period without compensation. Since that date, under an arrangement with the railroad union, if the worker completes the training period to the satisfaction of the company and is placed on the payroll, he is paid retroactively $4 per day for every day spent in training (Ex. 7, PR. 118). If he quits before completing the training, he is paid nothing for the work (PR. 16, 118). The company deducts Railroad Retirement tax from the money paid for the training period (PR. 98).

Both Circuit Courts of Appeals, with one judge dissenting in each instance, held that the trainees were not "employed" by respondents within the meaning of the Act. The First Circuit, while admitting that the trainees were "employees" within the literal language of the definition contained in the Act, placed its decision expressly on the theory that the trainees' work was not "pursued necessarily and primarily for the bene-

fit" of the company (PR. 140). The Sixth Circuit held that the company did not "suffer or permit" the trainees to work within the terms of the Act, but it is apparent from the opinion that the Court reached this conclusion primarily on the theory of lack of benefit to the company. Both courts relied heavily on *Walling* v. *Jacksonville Terminal Co.*, 148 F. (2d) 768 (C. C. A. 5), although in the *Jacksonville* case the trainees received no compensation whatsoever, and the Fifth Circuit indicated that a different result might have obtained had that factor been present. Judge Magruder, dissenting in the *Portland* case, and Judge Allen, dissenting in the *Chattanooga* case, urged that the trainees were permitted to work by respondents and therefore came squarely within the terms of Section 3 (g) of the Act which defines the word "employ" as including "to suffer or permit to work." While Judge Allen pointed out that as a practical matter it could not be said the work of the trainees was of no benefit to the companies, both judges thought that the question of benefit to the employer was irrelevant. Judge Magruder pointed out that the other provisions and the legislative history of the Act indicated a clear congressional intent to bring learners or trainees within the statute, and at the same time to provide administrative machinery to authorize lower wages in order to compensate for the fact that trainees "may be of little im-

mediate benefit—indeed, may be a 'disadvantage'—to the company" (PR. 141).

REASONS FOR GRANTING THE WRIT

The courts below have erroneously decided an important question of federal law which has not yet been, and which should be, settled by this Court. The decisions are out of harmony with the statutory definition of employment, the clear purpose of the learner provisions of the Act, and even the common law tests of the employment relation. Moreover, they open a widespread area of doubt as to the applicability of the Act to other industrial training programs. The importance of this question is indicated by a National Industrial Conference Board survey of 473 companies with a combined employment of 626,668, which revealed that four out of five companies had definite training programs. *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20. In the words of Judge Magruder's dissent in the *Portland* case, the decisions below constitute "a serious impairment of the administrative safeguards contained in Section 14 of the Act" (PR. 142).

Section 3 (e) of the Act defines "employee" as "any individual employed by an employer" and Section 3 (g) in turn defines "employ" as including "to suffer or permit to work." Senator Black referred to this definition of employment as "the

broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657, quoted in *United States* v. *Rosenwasser*, 323 U. S. 360, at 363. Since the trainees perform the same duties as the regular employees and are clearly "permitted" by respondents to do so, the conclusion that they are employees within the literal language of the statute is inescapable.

Were there any doubt as to the inclusion of these trainees within the broad statutory definition of "employee," it would be dispelled by the express language of other portions of the Act and its legislative history. Section 14 provides that "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices * * * under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe * * *." This provision clearly assumes that learners in an industrial setting are "employees" and are subject to Section 6 unless the Administrator's regulations provide otherwise. The decisions of the courts below that workers are not employees under the Act while training or learning would render Section 14 a mere

nullity and deprive it of any meaning or possible application.

Section 14, as the legislative history reveals, was included in the Act because Congress was aware of and took into account the various considerations against requiring the payment of minimum wages to workers "who do not meet the usual qualifications of employment"[2] but must be trained before they can perform their jobs efficiently and with full benefit to the employer. It is evident that Congress weighed these considerations against the reasons for assuring such workers the minimum compensation provided by the Act, and evolved a compromise whereby it required the payment of the statutory wages to workers generally, including learners, but in recognition of the possible hardships to the employer and the resulting danger of curtailment of opportunities for employment, it decided to allow "a certain tolerance"[3] for the payment of subminimum wages to learners under prescribed conditions.

The legislative history shows that, from the beginning of the hearings and debates on the wage

[2] See Statement of Assistant Attorney General Jackson, Joint Hearings before the Senate Committee on Education and Labor and House Committee on Labor on S. 2475, 75th Cong., 1st sess., 1937, pp. 38, 50. See also remarks of Representative Griswold, *id.*, p. 44.

[3] See Statement of Assistant Attorney General Jackson, Joint Hearings, *supra*, p. 50.

and hour bills, Congress gave particular consideration to such special classes of workers as children, learners or trainees, apprentices, and handicapped persons. This solicitude manifested itself in the discussion and consideration of various exceptions and exemptions for learners, apprentices, and handicapped workers. The legislative discussions show plainly that it was intended to include learners and apprentices within the term "employees." The only questions raised with respect to them were whether there should be some tolerance permitting payment of subminimum wages and who should determine the conditions of the tolerance. Among the suggested exemptions was a proposal by Representative Taylor of Tennessee to provide a "grace" period of six months' "training" for beginners before the minimum wage provisions of the Act should become applicable. 83 Cong. Rec. 7134. It is significant that this proposal was rejected in favor of the system of administrative regulation of learners provided by Section 14 of the present Act. Congress in that Section clearly provided that conditions under which learners could work below the minimum wage were to be regulated by the Administrator of the Wage and Hour Division charged with the responsibility of enforcing the Act in the public interest. Congress deliberately decided not to leave these conditions to the "discretion" of employers who would normally be influenced solely by private interests.

The decision reached by Congress—to place the regulation of the employment of all beginners in the hands of the Administrator—was apparently due to the Congressional desire (1) to assure all workers, including learners, the minimum wage whenever possible and (2) to prevent evasion of the minimum wage provisions of the Act under the guise of employing "learners."[4] The statutory provision employed to carry out these objectives, in its use of the phrase "employment of learners," left no room for doubt that learners are embraced within the term "employee."

In the face of the express provisions and the legislative history of the Act, it is difficult to see how the Act's coverage can be made to depend on the existence of a "primary or necessary benefit" to the employer as against the employee. As indicated by the legislative history, Congress was well aware of the fact that most learners or trainees are of little or no benefit to the employer during their training period and frequently represent a liability. As pointed out by Judge Magruder, "inexperienced operators of looms in a textile mill may spoil goods, get the machines out of order, have a low production rate, may be in fact an economic liability to the employer, until skill and facility are acquired" (PR. 141–142). Moreover, as a practical matter it cannot be said that the training is of no benefit to the employer who

[4] See 83 Cong. Rec. 7309; Joint Hearings, *supra*, pp. 37, 38, and 44.

thereby acquires a pool of men familiar with the company's system and facilities and available for work as regular employees. It is difficult to understand the payment of four or five dollars a day to the trainees during the war in the absence of any benefit to respondents. "A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130. It is significant that, although many employees derive some training and new skills from their employment, the benefit derived by the trainees in the instant cases appears to be quite limited. The type of knowledge acquired during respondents' training period is of primary benefit to the trainee only so long as he works for the company. Little time is devoted to learning the actual manual operations compared with the greater part of the training period devoted to learning the details of the particular company's system and facilities.

The courts below were impressed by the fact that the employer did not derive immediate benefits from the trainees because a full crew was usually on hand even though the trainees performed the actual manual work. But this Court has often recognized that workers are employed within the meaning of the Act when they perform merely preparatory activities, from which the employer derives no immediate benefit. *Tennessee*

Coal, Iron and R. R. Co. v. *Muscoda Local*, 321 U. S. 590, 598–9; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161; *Anderson* v. *Mt. Clemens Pottery Co.*, No. 342, October Term, 1945, decided June 10, 1946.

The courts below sought to minimize the effect of Section 14 on the theory that by its terms it applies only to those learners who are *employed* and that the trainees in the instant cases were not employed by respondents. This view apparently springs from the courts' belief that the question of employment is controlled by the existence of certain formal indicia of the employment relationship—that "it is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law."[8] But even apart from the plain statutory definition and the unmistakable Congressional intent as evidenced in Section 14 and in its legislative history, these trainees should be considered employees under well-established principles of law. It is significant that railroad trainees such as are involved in the instant cases have been held consistently to be "employees" both for the purpose of enabling them to recover under the employers'

[8] *Portland* majority opinion (PR. 139) and *Jacksonville* decision, both quoting from *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5). The *Chattanooga* majority opinion inferentially adopted this view by its reliance on the *Jacksonville* case.

liability statutes[6] and for the purpose of denying them recovery under the common law "fellow servant doctrine."[7] It follows, *a fortiori*, that they are employees within "the broadest definition that has ever been included in any one act." *United States* v. *Rosenwasser*, 323 U. S. 360, 363, n. 3.

Furthermore the narrow interpretation adopted by the courts below overlooks the congressional purpose in enacting this type of remedial legislation, and is inconsistent with decisions emphasizing the broad definition to be given "employee" under statutes such as this. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Walling* v. *Rutherford Food Corp.*, decided July 18, 1946, No. 3213 (C. C. A. 10).[8] It

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[6] *Brown* v. *Chicago, R. I. & P. Ry. Co.*, 315 Mo. 409, 286 S. W. 45; *Rief* v. *Great Northern Ry. Co.*, 126 Minn. 430, 148 N. W. 309; *Chesapeake & Ohio Ry. Co.* v. *Harmon's Admr.*, 173 Ky. 1, 189 S. W. 1135; *Findley* v. *Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198; *Atchison, Topeka & Sante Fe Ry. Co.* v. *Fronk*, 74 Kan. 519, 87 Pac. 698.

[7] *Huntzicker* v. *Ill. Central R. Co.*, 129 Fed. 548 (C. C. A. 6); *Millsaps* v. *Louisville, New Orleans & Texas Ry. Co.*, 69 Miss. 423, 13 So. 696; *Smith* v. *Western & Atlantic R. R. Co.*, 134 Ga. 216, 67 S. E. 818; *Weisser* v. *Southern Pacific R. R. Co.*, 148 Calif. 426, 83 Pac. 439; *Hewett* v. *Woman's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190.

[8] The definitions of employer in the National Labor Relations Act, which was before this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, and in

is by now well settled that the economic relationships between businesses and workers "cannot be fitted neatly into the containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes." These terms "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" and not by any "technical legal classification for purposes unrelated to the statute's objectives * * *. Where all the conditions of the relation require protection, protection ought to be given." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, at 128–129.

The Sixth Circuit was also apprehensive that "if trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away." (CR. 381.) Suffice it to say that Congress has expressly included apprentices within the provisions of the Fair Labor Standards Act, though permitting the Administrator to work out the conditions under which such apprentices could work below the minimum wage. Section 14.

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this Act are identical. Since this Act in addition includes a broad definition of "employ" not included in the National Labor Relations Act, Congressional intent to expand the concept of "employment" is even clearer in the case of this statute.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

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Nos. 335 and 336

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF FOR THE PETITIONER

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Federal Employers' Liability Act (Act of April 22, 1908), c. 149, 35 Stat. 65, 45 U. S. C. 51 ... 34

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American Management Association, Personnel Series No. 42, *Practical Techniques of Industrial Training* (1941), pp. 14–16	18
American Management Association, Personnel Series No. 47, *Principles and Methods of Industrial Training* (1941), by C. S. Matoon, pp. 34–35	17
American Management Association, Production Series No. 126, *Industrial Training Programs for Increased Production* (1940), by Ray J. Blyth, pp. 7–8	17
American Management Association, Production Executive Series No. 72, *Training Manual Workers* (1928), by Russell N. Keppel, p. 3	23
American Management Association, *How to Train Workers for War Industry* (1942), Alvin E. Dodd, and James O. Rice, pp. 52, 56	18
Child Labor Bulletin, Vol. I, No. 2, Aug. 1912	32
Child Labor Legislation Handbook (1904 issue), compiled by Josephine E. Goldmark	32
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83 Cong. Rec. 7391	14
83 Cong. Rec. 7393	14
83 Cong. Rec. 7396	14
Greene, James H., *Organized Training in Business* (1937), p. 16	23
H. Rep. No. 1452, 75th Cong. 1st sess., p. 15	13
H. Rep. No. 2182, 75th Cong. 3rd sess., p. 13	13
H. Rep. No. 2738, 75th Cong. 3d sess., pp. 17, 25, 33	13
Joint Hearings of the Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., 1937	13, 15
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Moore, Herbert, *Psychology for Business and Industry* (1942), p. 209 21

Personnel Policies in Cotton-Textile Industry, Monthly Labor Review (June 1936) p. 1485 19

Policy on Wages Below the Minimum, Office of National Recovery Administration, Division of Review, Work Materials No. 45 (March 1936), p. 3 19

Proceedings of National Conference of Commissioners on Uniform State Laws, 1930 32

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Productivity of Labor in the Cotton-Garment Industry, United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 662 (November 1938), p. 20 19

S. Rep. No. 884, 75th Cong., 1st sess., p. 7 13

Standards Recommended for Child Labor Legislation by International Association of Governmental Labor Officials 31

Tead and Metcalf, *Personnel Administration* (1933), p. 127 19

The Development of Minimum-Wage Laws in the United States, 1912 to 1927, United States Department of Labor, Women's Bureau, Bulletin No. 61 (reprinted 1934) pp. 205-244 19

Training for Industry, National Industrial Conference Board (1937) 15, 20, 23

Union Agreement Provisions, United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 686 (1942) 16, 19

Wages in Cotton-Goods Manufacturing, United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 663 (November 1938), pp. 93, 94 19

Watkins, Gordon S., and Dodd, Paul A., *The Management of Labor Relations* (1938), pp. 403-404 20

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v.

PORTLAND TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court in No. 335, *Walling* v. *Nashville, Chattanooga & St. Louis Ry.*

(CR. 356–371),[1] is reported at 60 F. Supp. 1004. The majority and dissenting opinions of the Circuit Court of Appeals for the Sixth Circuit (CR 378–382) are reported at 155 F. 2d 1016. The opinion of the district court in No. 336, *Walling v. Portland Terminal Co.* (PR. 123–126), is reported at 61 F. Supp. 345. The majority and dissenting opinions of the Circuit Court of Appeals for the First Circuit (PR. 135–142) are reported at 155 F. 2d 215.

JURISDICTION

The judgment of the circuit court of appeals in No. 335 was entered on June 1, 1946 (CR. 378). The judgment of the circuit court of appeals in No. 336 was entered on April 29, 1946 (PR. 142). The petition for writs of certiorari in both cases was filed on July 29, 1946, and was granted on October 14, 1946 (CR. 383, PR. 144). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether persons being trained for jobs with respondents by performing the actual duties and functions of the jobs under the supervision of the regular employees are employees of the respond-

[1] References to the record in No. 335, the *Chattanooga* case, will be indicated by "CR," and in No. 336, the *Portland* case, by "PR."

ents within the meaning of the Fair Labor Standards Act during the period of training.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) are as follows:

SEC. 3. As used in this Act—

* * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *.

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices * * * under special certificates

issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe * * *.

STATEMENT

Both of these suits were brought by the Administrator of the Wage and Hour Division to restrain the respondents from violating the minimum wage and record-keeping requirements of the Fair Labor Standards Act (CR. 2–6, PR. 1–5). The respondent in No. 335 operates an interstate railway system furnishing passenger and freight service and maintaining the customary shops, terminals, offices, and general railway facilities (CR. 3, 18). During the period covered by the complaint, all persons seeking employment as clerks, stenographers, switchmen, firemen, brakemen, messengers, callers, and porters, have been required to undergo a training period as a condition of their employment (CR. 73). Before commencing training, these workers file formal applications for employment, furnish references, take physical examinations, and, in some occupations, sign releases designed to protect respondent against claims for injuries (CR. 80, 149, 242).

The train service employees (switchmen, firemen and brakemen) are assigned to serve as "cubs" with regular crews without displacing any member of the regular crew (CR. 81, 367). But

they are trained only if it is expected that there will be a need for them as members of regular crews when the training has been completed (CR. 59, 65, 66, 128). Training under the supervision of a regular employee is required on each of the various jobs which will be performed by the trainee when he becomes a regular employee. Thus a switchman must train for several days on each of three shifts and work on each shift with the regular crew on each of seven different locations (CR. 29–30, 31). A yard fireman is required to train for at least four different jobs before being placed on the employment roll: firing the Diesel switch engine, firing the steam switch engine, hostler helper's job in the shop, and hostler helper's job on the outside (CR. 178). Over-the-road firemen must make fifteen or twenty runs, including trips in local service, local freight, fast freight, and passenger trips (CR. 95, 228). Brakemen are given a schedule which includes all the runs in each of the divisions (CR. 92, 242–245).

The cubs work the same hours (frequently over 12 hours a day—CR. 38, 186, 246, 253) and perform the same functions as the regular employees (CR 179, 186, 215–216, 252, 256). The cub switchmen throw switches, couple and uncouple cars, give signals, help classify trains, set hand brakes, and cut and connect air hose (CR. 32, 187, 215); cub firemen switch valves, keep a watchout for

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safety, shovel coal, make engines ready for the road, test them, fill the sand dome, coal bin and water tank and get the fire in proper condition (CR. 178, 179, 232); cub brakemen do switching, signalling, coupling and uncoupling of cars (CR. 244, 252, 256). In addition, cub brakemen when traveling between stations, whether a run is on their schedule or not, are expected to assist in loading and unloading freight (CR. 94, 244, 248, 249). The cubs do not displace the members of the regular crews under whom they work; the latter are responsible for seeing that the work is properly done and are paid their customary wages (CR. 180).

The length of the cubbing period varies with the occupation and respondent's need for regular workers (CR. 41, 213). Generally, the training period ranges from ten to thirteen days for switchmen (CR. 30, 31) to as long as six to seven weeks for the over-the-road firemen (CR. 227). However, the manual operations of some of the tasks may be learned in a few minutes (CR. 33, 34, 252). The principal purpose of the training is to teach the switchmen and the yard firemen the physical arrangement of respondent's yard and the signals peculiar to respondent's operations (CR. 33–36, 53, 62, 180–181), and to teach the over-the-road firemen and brakemen the road on which they will travel as regular employees (CR. 97, 236–237, 247–253). Thus, new workers go

through a "training period" even if they have already had experience in the particular occupation (CR. 205–206). Men with experience in firing, and already employed as regular firemen, have been required to cub in order to learn the new road when transferred from one of respondent's divisions to another (CR. 97–98).

Until the time of suit, the respondent also required training or "posting" under a regular employee by clerks, stenographers, messengers, callers, and porters (CR. 109, 126, 131, 140). At respondent's Chattanooga yard, new yard clerks and office clerks worked without pay eight hours or more a day, five to seven days a week, for periods ranging from three to eight weeks (CR. 19, 126, 139). Frequently, these clerks worked twelve or fourteen hours and in at least one instance twenty-four hours a day (CR. 139). The trainee-clerk was expected to work on each shift and on several different clerical jobs (CR. 106, 129–130, 158). In the same manner as regular employees, the clerks, among other things, kept records of incoming and outgoing freight trains, prepared lists of outgoing freight, checked way bills against incoming freight, and made out way bills and expense bills (CR. 107, 115–116, 130, 156). The trainees received their instructions from the supervisor, but after the first two days, they did the checking, made the entries, and prepared the bills themselves (CR. 116). Stenog-

raphers, graduated from business college and with years of experience, were required to work five or six days without pay to become familiar with respondent's office procedures (CR. 153). "Callers," whose duties are to call train crew members before time for their departure, messengers, and porters worked from two to six days without pay, learning the duties of their jobs by actually performing the work under supervision (CR. 151–155).

The respondent "recognized the possibility" that the clerks, stenographers, messengers, callers and office porters, "on rare occasions might perform a beneficial service for defendants at the same time that the regular employees were doing a similar but not identical assignment" (CR. 18–19). It asserts that for this reason, these trainees were paid in accordance with the requirements of the Act after its effective date (CR. 18–19). In fact, however, the practice of not paying them continued, at least at the Chattanooga yard, until suit was brought in November 1944 (CR. 19). In any event, respondent continues to contend that it does not "employ" these workers while they are training, that the money paid is not compensation for employment, and that it is under no duty to comply with the Act with respect to them (CR. 151, 175, 304).

Prior to December 1943, cub switchmen, firemen and brakemen received no compensation for their

work (CR. 48). In December 1943, "as an inducement or incentive" to obtain workers because of the manpower shortage created by the war, the company adopted the policy of paying them $5 a day provided that they subsequently became "regular" employees (CR. 75, 312). Workers who did not become "regular" employees received nothing for the time spent in training. In January 1945, the respondent adopted the practice of paying all cubs $5 a day, whether or not they were ultimately hired as "regular" employees (CR. 313). This practice, however, was a temporary expedient growing out of the war emergency (CR. 74, 75, 78, 304). The respondent continues to deny that the trainees are employees and asserts its right to discontinue the payments at any time (CR. 83, 84).

The respondent in No. 336 operates a terminal facility at Portland, Maine, serving several interstate railroads (PR. 20–21). The yard brakemen, who undergo a training period of one to two weeks substantially like that of the brakemen in No. 335, are the only persons involved in this action (PR. 26–27, 38–39, 124). Prior to October 1, 1943, they trained without compensation. Since that date, under an arrangement with the railroad union to cover the emergency period, they have been paid $4 per day for the training period after becoming regular employees. (Ex. 7, PR. 118.) Yard brakemen who did not complete the training re-

ceived nothing (PR. 16, 118). Deductions for Railroad Retirement tax were made by the respondent from these payments (PR. 98).

The district courts, in both cases, denied injunctions on the ground that the trainees were not employees within the meaning of the Act (CR. 372, PR. 126). These judgments were affirmed by the courts below with one judge dissenting in each case (CR. 378, PR. 135). In No. 336, the First Circuit Court of Appeals held that, although the trainees were within the literal language of the Act's definitions, they were not employees because their work was not "pursued necessarily and primarily for the benefit" of the company (PR. 140). In No. 335, the trainees were held not to be employees by the Sixth Circuit Court of Appeals on the ground that the respondent did not "suffer or permit" them to work *for respondent* (CR. 380–381). Both courts also appear to have relied to some extent on the absence of a contract of employment. The dissenting judges in both cases were of the opinion that the definition of "employ" in Section 3 (g) of the Act, as including "to suffer or permit to work," brought the trainees within the Act's scope. Judge Magruder, dissenting in No. 336, was also of the opinion that the decision of the court constituted "a serious impairment of the administrative safeguards contained in Section 14 of the Act" (PR. 142).

SPECIFICATION OF ERRORS TO BE URGED

Both courts below erred:

1. In holding that the trainees were not employees of the respondents within the meaning of the Fair Labor Standards Act.

2. In affirming the judgments of the district courts which denied petitioner's prayers for injunctions.

SUMMARY OF ARGUMENT

The language of Section 14 of the Act which authorizes the Administrator to establish regulations for the "employment of learners" at substandard wages clearly contemplates that learners are employees within the scope of the Fair Labor Standards Act. When Congress referred to "learners" in Section 14, it used a term which had a definite connotation in the practice of industry. The legislative history of the Act indicates that the term was used in its ordinary industrial sense. The trainees involved in this action were clearly learners in the usual industrial sense, and, therefore, employees within the Act. To hold otherwise would narrow the application of Section 14 in a manner which would impede the accomplishment of the purpose for which that Section was enacted.

The Congressional assumption, in Section 14, that industrial learners are employees finds support in the broad definition of "employ" in Sec-

tion 3 (g) as including "to suffer or permit to work." The trainees here, by performing the actual duties of the job, were engaged in work which was not only suffered or permitted but in fact required by respondents as a condition to regular employment. Moreover, railroad trainees were considered employees even under the more limited concepts of the common law. Training similar to that in the instant cases has long been an established custom in the railroad industry. The question of the status of trainees under the common law has frequently arisen and the courts, with singular consistency, have held trainees to be employees. Surely, then, they are employees under a statute drafted with the manifest purpose of expanding the common-law concept of employment.

ARGUMENT

I

THE PROVISIONS OF THE ACT FOR THE REGULATION OF "LEARNERS" DEMONSTRATE THE CONGRESSIONAL INTENT TO INCLUDE THESE TRAINEES AS EMPLOYEES WITHIN THE SCOPE OF THE STATUTE

Section 14 of the Act provides that "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners * * * at such wages lower than the minimum * * * as

the Administrator shall prescribe." This provision for regulation by the Administrator of the employment of learners plainly contemplates that persons engaged as learners are employees within the meaning of the Act.

The legislative history of the Act confirms this conclusion. The Congressional purpose to bring learners within the scope of the Act was clear from the beginning. At the very outset of the hearings on the proposed legislation which was eventually enacted as the Fair Labor Standards Act, Assistant Attorney General Jackson directed the attention of the House and Senate Committees to the provisions for the employment of learners and apprentices at subminimum wage rates.[2] Although the various bills proposed contained no definition of learners and apprentices, it was recognized that those terms were intended to include "employees who do not meet the usual qualifications of employment."[3] The legislative history of the Act reveals that at every stage, both the House and Senate bills contained provisions for the employment of learners substantially like those which were enacted into law.[4] There can

[2] Joint Hearings of the Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., 1937, pp. 37–38.

[3] *Id.*, at 44, 50.

[4] See e. g., S. Rep. No. 884, 75th Cong., 1st sess., p. 7; H. Rep. No. 1452, 75th Cong., 1st sess., p. 15; H. Rep. No. 2182, 75th Cong., 3d sess., p. 13; H. Rep. No. 2738, 75th Cong., 3d sess., pp. 17, 25, 33.

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therefore be no question but that Congress intended to include learners and apprentices among the employees subject to the Act.

Only two questions were raised during the debates on the bills with respect to the employment of learners. Representative Michener objected to the delegation of authority to control the employment of learners and apprentices (83 Cong. Rec. 7396). Representative Taylor raised the question whether there should be some beginning period during which no minimum of any sort should apply. He proposed to exclude learners and apprentices from the scope of the Act for a period of six months (83 Cong. Rec. 7389, 83 Cong. Rec. 7134, defeated 83 Cong. Rec. 7393). In proposing his amendment, Congressman Taylor referred to what he viewed as the desirability of completely excepting "beginners and apprentices" from the Act (83 Cong. Rec. 7391). The rejection of his proposal demonstrates the Congressional intent to include "beginners."

Thus Congress, in Section 14, clearly provided that the conditions under which learners could work below the minimum wage were to be regulated by the Administrator of the Wage and Hour Division, charged with the responsibility of enforcing the Act in the public interest. It deliberately decided not to leave these conditions to the discretion of employers who would normally be influenced by their own pecuniary interests.

The decision reached by Congress—to place the regulation of the employment of all beginners in the hands of the Administrator—was apparently due to the Congressional desire (1) to assure all workers, including learners, the minimum wage whenever possible and (2) to prevent evasion of the minimum wage provisions of the Act under the guise of employing "learners."[8] The statutory provision employed to carry out these objectives, in its use of the phrase "employment of learners," leaves no room for doubt that learners are embraced within the term "employee." There would have been no point to Section 14 if learners were not employees within the meaning of the Act.

Since it is clear that learners were intended to be subject to regulation under the Act, the only question remaining would appear to be whether respondents' trainees are learners within the statutory contemplation. The employment of learners in industry was a well-established practice when the Fair Labor Standards Act became law. A survey of 473 companies, made in 1937 by the National Industrial Conference Board, revealed[9] that 410 had training programs, and of the codes

[8] See 83 Cong. Rec. 7309; Joint Hearings, cited *supra*, note 2, pp. 37, 38, and 44.

[9] *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20. See *Williams* v. *Evans*, 139 Minn. 32, 166 N. W. 504 (1918): "These terms ['learners' and 'apprentices'] have a modern meaning reasonably well understood."

promulgated under the National Industrial Recovery Act, 213 had provisions relating to the employment of learners. In the light of this well-established practice of employing learners in industry, one can say with assurance that Congress used the term in its ordinary industrial sense.

No significant differences can be perceived between learners in the railroad industry, such as respondents' trainees here, and learners in other industries. Variations in such matters as the period of training, the nature of the training, and the amount of compensation paid will, of course, occur. But the essential relationship of the training program to the industrial purpose is identical. The wide variety of workers who were considered learners in industry clearly encompasses respondents' trainees. As the Bureau of Labor Statistics observes, the term "learner" in its industrial context "is applied to beginners in occupations or trades * * * which * * * take a relatively short time to learn. A learner is variously defined in agreements as an employee with no previous experience in the industry; or as one who has not worked in the industry for a specified total period of time; or as one who has not heretofore performed the work for which he is hired."[1]

Authorities on industrial personnel policies have described customary learning programs in

[1] U. S. Bureau of Labor Statistics, Bulletin No. 686, *Union Agreement Provisions*, 1942, p. 191.

terms which reveal that respondents' programs are substantially the same as those in other industries which have not questioned that their trainees are employees under the statute. In a typical program, the learner first observes an experienced operator and then takes over the operation of the machine under the direction of the regular employee.[8] In other cases, the learner may practice on scrap materials, and may even spend part of

[8] "* * * we simply place two men on a machine, one a regular operator and the other an observer or learner. The learner * * * observes very closely the techniques used by the experienced operator and from time to time actually takes over the operation of the machine under the direction of the experienced man. * * * The learner is paid the minimum rate established for the industry during his period of service as an observer, which rate is increased as soon as he is assigned to a machine of his own." C. S. Matoon, Director of Personnel, Curtiss-Wright Aeroplane Division, writing in American Management Association, Personnel Series No. 47, *Principles and Methods of Industrial Training* (1941), "Mass Instruction of Inexperienced Employees," pp. 34–35.

"At first the learner does nothing but watch the operator. But after a few days he is allowed to help with the setup, then with increasingly difficult work until he can actually operate the machine himself * * *. [The learners] are started at 60 cents per hour." Ray J. Blyth, Personnel Director of the Warner and Swasey Company, writing in American Management Association, Production Series No. 126, *Industrial Training Programs for Increased Production* (1940), pp. 7–8. See also *infra*, note 16, pp. 21–22.

See also proceedings before the Wage and Hour Division, United States Department of Labor, in the matter of Learner Regulations in the Textile Industry Pursuant to Section 14 of the Fair Labor Standards Act (held November 28, 29, 30, 1938; reopened October 12 and December 13, 1939):

"Since it takes months or even years before an operator be-

his time receiving classroom instruction.[8] In all cases, the learner, who is also referred to interchangeably as a student, a trainee, or an observer, is acquiring the skill or the knowledge which he will use when he becomes a fully trained employee of the employer affording the training. In other respects, too, the respondents' training programs fit the typical industrial learner pattern. In the usual case, "The length of the learning period specified in agreements ranges from two weeks to one year; the most usual terms being 30

comes truly skilled, he cannot be permitted the free use of a machine to produce what he can at piece work rates. The company must prevent spoilage of goods so far as possible and must educate the learner under the tutelage of an expert until he is capable of taking over a machine and producing a large proportion of perfect goods.

"Whatever a learner on such an operation is paid is a total loss as he produces nothing and at first is even a hindrance to his teacher, who, if he is to teach the learner, must let him do jobs that the teacher, himself, could do more quickly, thus cutting down the teacher's earnings. As the teacher is usually a skilled operator who is willing and able to teach also it frequently means that he has to be paid extra over the regular piece work rate to teach in order to offset his reduced earnings." Testimony of Mr. Wilwyn Herbert, Secretary, Narrow Fabrics Institute, New London, Conn., November 29, 1938, p. 140.

[8] See, e. g., the training program of the Ford Company, described by the Superintendent of the Henry Ford Trade School in American Management Association, Personnel Series No. 42, *Practical Techniques of Industrial Training* (1941), pp. 14–16; and the programs of the Sperry Gyroscope Company and the Bethlehem Steel Company described by Alvin E. Dodd and James O. Rice, President and Editor, respectively, of the American Management Association, in *How to Train Workers for War Industry* (1942), pp. 52, 56.

days, 60 days, and 3 months."[10] Respondents' cubs train from one to two weeks in No. 336 and from a few days to seven weeks in No. 335 (PR. 39, CR. 227). And just as respondents' trainees are free not to continue in respondents' employ at the conclusion of their learning period, so learners generally may, and frequently do, sever relations with their employers during or at the end of their training.[11] Although the prevailing custom in industry prior to the Fair Labor Standards Act was to pay wages to learners, this was not the universal practice.[12] Industry has recognized that the training of learners is a neces-

[10] U. S. Bureau of Labor Statistics, Bulletin No. 686, *Union Agreement Provisions*, 1942, p. 193.

[11] Tead and Metcalfe, *Personnel Administration* (1933), p. 127. See also *infra*, note 19, p. 29.

[12] *Union Agreement Provisions*, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 686 (1942), p. 192; *Policy on Wages Below the Minimum*, Office of the National Recovery Administration, Division of Review, Work Materials No. 45 (March 1936), p. 3; *The Development of Minimum-Wage Laws in the United States*, 1912 to 1927, U. S. Department of Labor, Women's Bureau, Bulletin No. 61 (reprinted 1934) pp. 205-224; see minimum wage determinations under the Walsh-Healey Public Contracts Act for the Cotton Garment and Allied Industries, effective August 2, 1937, 2 F. R. 1333; Men's Neckwear Industry, effective August 2, 1937, 2 F. R. 1336; Men's Raincoat Industry, effective August 2, 1937, 2 F. R. 1336; Seamless Hosiery Industry, effective August 2, 1937, 2 F. R. 1338; and Work Glove Industry, effective August 2, 1937, 2 F. R. 1339. *Personnel Policies in Cotton-Textile Industry*, 42 Monthly Labor Review (June 1936), p. 1485. Also, *Productivity of Labor in the Cotton-Garment Industry*, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 662 (November 1938) page 20; *Wages in Cotton-Goods Manufactur-*

sary part of our industrial system.[15] And its concept of the incidents of learner training was clearly in the mind of Congress when the regulatory provisions of Section 14 were drafted and enacted.

Although the trainees in these cases are plainly "learners" within the customary meaning of the term, three circuit courts of appeals have held that they are not "employed as learners" within the scope of the Act.[16] In reaching this conclusion the courts have emphasized (1) that the work of the trainees resulted in no immediate benefit to the railroads, and (2) that the trainees had agreed that they were not employees during the training period. We shall show that the lack

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ing, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 663 (November 1938), pp. 93, 94; *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20.

[15] "The operations of each organization are so numerous and the conditions in each enterprise so different that no institution outside of industry and apart from actual production can fully equip individuals for the demands of each line of business. Even if our schools were capable of properly training employees for industry and if society would sanction the assumption of such a responsibility, circumstance would still make it imperative for each establishment to provide its own system of training." Watkins, Gordon S., and Dodd, Paul A., *The Management of Labor Relations* (1938), pp. 403–404. See also *infra*, note 17, p. 23.

[16] The courts below relied on *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5), which presented a factual situation substantially similar to those now before this Court. For the reasons set forth in this brief, we believe that the *Jacksonville* decision is erroneous.

of immediate benefit in no way differentiates the trainees in this case from other learners who are universally recognized to be employees under the Act, and that parties, by private agreement, cannot narrow the scope of a remedial statute.

Management has always recognized that the typical learner is not, during the learning period, of any immediate benefit to his employer.[15] As Judge Magruder, dissenting in No. 336, observed: "* * * inexperienced operators of looms in a textile mill may spoil goods, get the machines out or order, have a low production rate, may be in fact an economic liability to the employer, until skill and facility are acquired" (PR. 141–142). The experience of the Wage and Hour Division, in administering the learner provisions of Section 14, reveals that the learners for whom certificates are sought frequently contribute no immediate benefit to their employer, and are in some cases an actual hindrance to productive work because they require supervision by regular employees.[16]

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[15] "Some form of training has always been recognized as an essential part of an organization; regardless of the type of background or preparation any newcomer may have had, the demands of an organization are peculiar to it and necessitate the acquisition of the skills or arts which the particular job imposes on the operator. Introducing the novice to his new job and anticipating a below-average production during the introductory period are the accepted obligations of any supervisory force." Moore, Herbert, *Psychology for Business and Industry* (1942), p. 209.

[16] See, e. g., proceedings before the Wage and Hour Division of the United States Department of Labor in the matter

Thus, the fact that the work of a learner does not immediately contribute substantially to his

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of Application of United States Independent Telephone Association and Sundry Other Parties Pursuant to Section 14 of the Fair Labor Standards Act of 1938, Washington, D. C., December 7, 1939. "Of course, as far as classifying as productive, for the first five or six weeks an operator, you might say that she has no—that she does nothing of any value for the telephone company because she not only isn't able to handle the call without the help of someone else, but there is the cost of the person's time who has to listen in with her, so she is a total loss to the company for her initial period of five or six weeks." (Traffic Supervisor for Illinois Telephone Association, pp. 62–63.)

"I would consider that her first month of employment certainly is a total out-of-pocket wage as far as the telephone company is concerned because she is not handling commercial traffic." (General Traffic Superintendent for the Central Operating Companies of the General Telephone System, Madison, Wisconsin, p. 128.)

See also proceedings before the Wage and Hour Division, United States Department of Labor, in the matter of Learner Regulations in the Textile Industry Pursuant to Section 14 of the Fair Labor Standards Act (held November 28, 29, 30, 1938; reopened October 12 and December 13, 1939): "The expense to the mill runs from $50 to $100 per learner on account of their being non-productive for from one to two weeks, and also because of the loss of production of the coach or teacher." Letter filed by Throwsters Research Institute, dated October 17, 1939.

"It is of course quite obvious that during the learning period the employee is of little benefit to the employer * * *. We believe that the hourly rate paid to learners should be sufficient to maintain them * * *." Letter filed by Rhode Island Textile Association dated, October 5, 1939.

"The production drain and cost of such training actually costs the employer in addition an amount almost equal to that paid the employee while learning." Telegram filed by Throwsters Research Institute, Inc., dated October 24, 1938.

employer's income does not alter the status of the learner as an employee. But as a practical matter, the work of the learner or trainee has consistently been considered by industry to be of very real benefit to the employer, in that he acquires a pool of men familiar with his operations and available for work as regular employees.[17] The general practice of paying learners confirms the fact that the employer derives a benefit from them. "A court would not readily assume that a

[17] "Industry has always educated and trained its members in their work. Work cannot be performed, people cannot work together without this being done. A factory just cannot operate without this being so. One of the important functions of industrial managements is educating and training their manual workers in their work." American Management Association, Production Executive Series No. 72, *Training Manual Workers*, by Russell N. Keppel, Personnel Manager, Bayonne Refinery, Standard Oil Company of New Jersey, 1928, p. 3.

"The cost of a training program cannot properly be regarded as an extraneous or gratuitous expense that can properly be escaped. Building a competent working force for the future is nothing less than assuring the perpetuation of industry itself. The best productive equipment is worthless unless the skilled labor needed for its operation is available. Since every company is going to benefit from the availability of competent labor of the type which it requires, every company should participate, in proportion to its size and ability, in the training of its labor." National Industrial Conference Board, *Training for Industry* (1937), p. 29.

"Training is the most important of all of the personnel functions. No matter how carefully workers are selected, they cannot perform their duties satisfactorily and economically without some sort of training." Greene, James H., *Organized Training in Business* (1937), p. 16.

corporation's management was spending stockholders' money on a mere hobby or an extravagance." *Armour & Co.* v. *Wantock,* 323 U. S. 126, 130.

As a matter of fact, the benefit to the employer in the employment of learners may well outweigh the benefit to the learner. The learner may frequently acquire little training of value to him in other employments, but merely knowledge of use only while he works for the particular employer. In the instant cases, for example, little time is required to learn some of the actual manual operations. Most of the training period is devoted to becoming acquainted with respondents' facilities. Thus, the experienced stenographers in No. 335 were learning respondent's filing system and office practices (CR. 153) for the purpose of better serving respondent, and not for the purpose of improving their general stenographic skills. And the same is true of the experienced trainmen (CR. 97–98, 205–206). In any employment, a new employee must learn the peculiarities of the particular establishment, but the generally accepted practice in industry is to recognize this brief "learning" period as one of the incidents of the employment rather than to treat it as a pre-employment activity.

But it is no more fruitful to discuss the comparative advantages which employer and learner derive from the learning period than to attempt

to determine which party obtains the primary benefit from any employment relationship. The employer receives the worker's output; the worker receives his compensation. Here the employer receives a pool of trained men; the learner receives his training. But the question of who derives the greater benefit does not admit of abstract answer, and may well vary with individual cases. Clearly the employer derives some benefit; respondents here are not offering the training out of philanthropic motives. "The railway company was not conducting a free school for the education of freight brakemen." *Atchison, Topeka & Santa Fe Ry. Co.* v. *Fronk*, 74 Kan. 519, 523, 87 Pac. 698. And in the light of a clearly expressed Congressional purpose to include learners within the scope of the Act, it is plain that the test of benefit to the employer, if it be a test of the employment relation, is met by the trainees here quite as much as by other industrial learners.

Accordingly, insofar as the decisions below rest on the theory that the trainees are of no immediate benefit to the respondents, they fail to afford any basis for distinguishing these trainees from other industrial learners who are clearly employees within the meaning of the Act. The court below, in No. 336, purported to find support for its "benefit" test in this Court's decisions in the portal-to-portal cases (*Jewell Ridge Coal*

Corp. v. *Local No. 6167,* 325 U. S. 161, 163–166; *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123,* 321 U. S. 590, 598). But in those cases this Court held that certain non-productive activities were compensable under the Act because they resulted in productivity at a later time. Similarly, here, the purpose of the training is to enable the performance of productive work for the employer at a later time. To interpret the portal-to-portal cases as requiring a showing of immediate benefit to the employer would not only do violence to this Court's decisions in those cases, but, as applied to the cases at bar, would all but result in reading Section 14 out of the Act by limiting its applicability to that comparatively small group of learners and apprentices whose work results in immediate financial gain to the employer.

The courts below, although admitting that the trainees are learners, have held that they are not "employed as learners" within the meaning of the Act.[18] Since, as we have seen, the activities of the trainees resemble in all material respects the work of other learners who are concededly employed, the view of the courts below must rest upon the theory that the applicability of the Act to learners may depend on the contractual arrangement of the parties. The court in No. 336

[18] This argument is made expressly in No. 336 (PR. 140) and inferentially in No. 335 in which the court below (CR. 381) adopted the reasoning of *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d. 768, 770 (C. C. A. 5).

quoted *Bowman* v. *Pace*, 119 F. 2d 858 (C. C. A. 5), to the effect that "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law" (PR. 139). But this view is premised upon a regard for the contractual powers of the parties which this Act, like other similar legislation, is expressly designed to limit. Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 392-393. An employee under this Act cannot contract to receive less than the amount due under the statute. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697; *Schulte* v. *Gangi*, No. 517, October Term, 1945, decided April 29, 1946. An agreement to accept nothing or an industrial practice or custom to the same effect stands on no better footing. *Tennessee Coal, Iron, & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161. And agreements to establish a relationship other than that of employer and employee have been disregarded in decisions under the Act. In *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4), a contract with the railroad providing that redcaps were licensees rather than employees and were not to receive compensation from the railroad was held not to foreclose the existence of an employment relationship. The statutory standards were held to apply notwithstanding the fact that a wage liability had not previously existed. See *Williams* v. *Terminal*

Co., 315 U. S. 386, discussed *infra*, note 22. See also *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662; cf. *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C. C. A. 6). As this Court stated in the *Brooklyn Bank* case, 324 U. S. at 705, quoting from *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 360: "* * * whether the policy of * * * [the] legislation contemplates the one result or the other * * * is the controlling question." As we have seen, the policy of the legislation contemplates the inclusion of learners under the Act. The trainees in these cases are in all the relevant aspects of their duties and their relationship to respondents precisely like other learners. They cannot waive the requirements of the Act by a mere agreement that they shall not be regarded as employees. Such an agreement is particularly vulnerable where, as here, it provides for the payment of substantial sums which can only be characterized as wages.

In holding that the trainees are not "employed as learners" (see *supra*, note 18), the courts below took the view that Section 14 presupposes an employment contract before the learner regulations can become applicable. Under this reasoning, not only learners and apprentices but also messengers and handicapped workers, who are similarly provided for in Section 14, would be within or without the statute depending upon the terms of their individual contracts with their em-

ployer. To imply that Congress intended to let these groups contract away their rights under the Act, while protecting the wages of more skilled labor, would not only "infer Congressional idiosyncrasy" but would "impute to Congress a desire * * * for drastic legal differentiation where policy justifies none." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 393, 394.

Finally, the courts below were apparently influenced by the freedom of the respondents not to offer, and of the trainee not to accept, permanent employment at the end of the training period. But this too is characteristic of the employment of learners generally in industry.[19] The courts below also adverted to the trainee's freedom from discipline and right to absent himself from training. But the trainee's freedom is hardly greater than that of any employee, who may absent himself at the cost of his daily wage and at the risk of being denied future employment.[20]

[19] A study made of a representative sampling of applications for learners certificates filed in 1943 with the Wage and Hour Division, United States Department of Labor, indicates that of 64,893 learners hired by 359 firms, 34,857 or 53.7 percent were separated within a year. The reports of only 162 firms indicated the reasons for the separations. Of 17,864 learners separated in these firms, 16,690 or 93.4 percent left voluntarily before completion of the training period.

[20] Certainly the trainee is no freer in these respects than the homeworker, who has been held to be an employee under this Act. *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C. C. A. 6); *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 692. Cf. *Gemsco* v. *Walling*, 324 U. S. 244.

Thus the trainees in these cases resemble in all the significant aspects of their work the learners in industry in general.[21] The implications of the decisions below would therefore seem to exclude from the Act not only the trainees in these cases, but also the learners in other industries who have long been regarded as employees in industrial practice. The elements of employment which the courts below felt to be essential to the existence of the relationship and to be lacking here, are equally lacking in the case of other industrial learners. The effect of the decisions below is thus to cast grave doubt on the necessity for applications for learner certificates in many industries, and to destroy the protection which Congress intended to assure both employer and employee through the subminimum wage device of Section 14. In the words of Judge Magruder, dissenting in No. 336, the decisions constitute "a serious impairment of the administrative safeguards contained in Section 14 of the Act" (PR. 142).

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[21] This is not to say, of course, that respondents would necessarily be awarded permission to employ these trainees at subminimum wages. Whether respondents would be awarded such permission could only be determined by the Administrator after application by respondents in accordance with the regulations issued pursuant to Section 14. Code of Federal Regulations, Title 29, Part 522.

II

THE TRAINEES ARE INCLUDED WITHIN THE STATUTORY DEFINITION OF THE EMPLOYMENT RELATION

We have seen that Congress, in Section 14, assumed that learners are employees subject to the Act, and, as we shall show, the Act's definition of the employment relationship is sufficiently broad to embrace them. The statute defines "employee" as "any individual employed by an employer" (Section 3 (e)), and also defines "employ" as including "to suffer or permit to work." Senator Black referred to this definition as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657), and this Court, in *United States* v. *Rosenwasser*, 323 U. S. 360 at 362, stated that "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."

In defining "employ" as including "to suffer or permit to work," terms which had frequently been employed by legislative draftsmen and to which earlier judicial decisions had given broad scope, Congress made clear its intention to enlarge the scope of employment under the Act far beyond common-law limitations. Cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 128–129.[22] State statutes prohibiting child

[22] In *Williams* v. *Terminal Co.*, 315 U. S. 386, relied upon by the Jacksonville Terminal Company, amicus (Br. in Opp., pp. 10–11), it was conceded, notwithstanding the absence of a prior obligation on the part of the company to pay wages, that the redcaps were employees. 315 U. S. at 391.

labor in particular occupations or industries regularly used the terms "suffer" or "permit" in defining the scope of their application." In construing these statutes, the highest courts of the States have consistently held that they went beyond the common-law concept of the employment relation and extended to situations in which there was no contractual relation between the minor and the "employer." *Chattanooga Implement & Mfg. Co.* v. *Harland*, 146 Tenn. 85, 239 S. W. 421 (1922); *Curtis & Gartside Co.* v. *Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913); *Purtell* v. *Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912); *People ex rel. Price* v. *Sheffield Farms Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474

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[29] At the time of the enactment of the Fair Labor Standards Act, the phrase "employed, permitted, or suffered to work" was contained in the child labor statutes of thirty States and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (e. g., issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase "employed or permitted to work" was found in eleven State statutes as well as in the federal statutes held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra*, pp. ~~88–89.~~ 39-40.

(1918); *Commonwealth* v. *Hong*, 261 Mass. 226, 158 N. E. 759 (1927); *Graham* v. *Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934). By selecting statutory language in general use which had received consistently broad judicial interpretation, Congress manifested its intent to embody that interpretation in this legislation. *Interstate Commerce Comm.* v. *Parker*, 326 U. S. 60, 65; *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115; *Keck* v. *United States*, 172 U. S. 434, 446. The intent to give the words "suffer or permit" the same scope they had previously been accorded is confirmed by the fact that Congress employed them in the same context as they had been employed by the States, namely, to regulate the employment of child labor. Section 12. In the Fair Labor Standards Act, however, Congress used the same definitions for wage and hour for child labor regulation. As this Court observed in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 504: "The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions." The meaning of "suffer or permit to work," therefore, is as broad when applied to the wage and hour provisions of the Act as when applied to its child labor provisions.

In view of the Congressional intent to extend the application of the Act beyond common-law limitations, it would seem to follow, *a fortiori*,

that persons who would be considered employees at common law are within the concept of "employee" as used in this Act. Although this Court observed in *National Labor Relations Board* v. *Hearst Publications, supra,* that "few problems in the law have given greater variety of application and conflict in results" than the question of the scope of employment at common law (322 U. S. at 121), railroad trainees have repeatedly been held to be employees at the common law. Numerous decisions have held them to be employees under the "fellow servant" doctrine with the result that recovery for injury was denied. *Huntzicker* v. *Illinois Central R. Co.,* 129 Fed. 548 (C. C. A. 6); *Millsaps* v. *Louisville, N. O. & T. Ry. Co.,* 69 Miss. 423, 13 So. 696; *Smith* v. *Western & Atlantic R. R. Co.,* 134 Ga. 216, 67 S. E. 818; *Weisser* v. *Southern Pacific R. R. Co.,* 148 Calif. 426, 83 Pac. 439. Similarly, numerous decisions under the Federal Employers' Liability Act [24] have permitted recovery by railroad trainees, like those now before this Court, on the ground that they are employees of the railroads under the common law.[25] *Brown* v. *Chicago, R. I. & P. Ry. Co.,* 315 Mo. 409, 286 S. W.

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[24] Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. 51.

[25] The Federal Employers' Liability Act adopted the "conventional" concept of the employment relationship. *Robinson* v. *Balt. & Ohio R. R.,* 237 U. S. 84, 94; *Hull* v. *Philadelphia & Reading Ry. Co.,* 252 U. S. 475, 479.

45; *Rief* v. *Great Northern Ry. Co.*, 126 Minn. 430, 148 N. W. 309; *Findley* v. *Coal & Coke Ry. Co.*, 76 W. Va. 747, 87 S. E. 198; cf. *Chesapeake & Ohio Ry. Co.* v. *Harmon*, 173 Ky. 1, 189 S. W. 1135; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Fronk*, 74 Kan. 519, 87 Pac. 698. Thus the trainees have been held to be employees at common law, both for the purpose of defeating recovery for injuries under the "fellow servant" doctrine, and for the purpose of allowing recovery under Employers' Liability Acts. In *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5), however, the court declined to follow these decisions in determining whether railroad trainees are employees under the Act for the reason that "wages are due according to principles of contract, not of tort." But where the "principle of tort" involved has been used both to grant and to withhold recovery for injury, policy reasons for differentiating between the scope of employment in tort and contract actions at common law would seem largely to disappear. In any event, as we have seen, the statutory definition incorporates into the Act a concept of employment which the child labor decisions demonstrate beyond question was intended to disregard principles of contract. Thus, even if the Act merely adopted the common-law concept of the employment relationship, the

tort cases cited above would establish that the trainees here involved are employees.[28]

The statutory definition and the specific provision for learners cannot be construed as limitations on the common-law principle that extended to these trainees the rights and liabilities of the employment status. On the contrary, the social policy embodied in the Fair Labor Standards Act plainly envisages a broad, rather than a narrow, application of the employment concept. Cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. Cf. *Virginian Ry.* v. *System Federation*, 300 U. S. 515, 557. Consequently, these trainees who would be employees at common law, are clearly embraced by the statutory definitions. There can, of course, be no doubt that the trainees perform work for the respondents. They actually fire the engines, throw the switches, couple the cars, load the freight, and perform the various clerical, messenger, and porter functions performed by regular employees. Whether this work benefits the respondents (who as we have seen derive as much "benefit" from these trainees as any employer customarily derives from the work of his "learners") is hardly relevant in determining whether they "suffer or permit" it to be done. There is no question but that respond-

[28] See also *Williams* v. *Evans*, 139 Minn. 32, 166 N. W. 504 (1918), in which learners were regarded as employees for purposes of a State minimum wage statute.

ents "permit"—indeed, they actually require—the trainees to perform services necessary to the operation of the trains as a condition to their obtaining regular employment. Under the circumstances, the trainees fall plainly within the literal language as well as within the clear intent of the legislation."

The statutory definition of the employment relation is thus well calculated to effectuate the intent of Congress to include learners within the scope of the Act. Whether one is "employed" as a learner within the meaning of Section 14 is determined not by comparing the "benefits" to the learner and the employer nor by the terminology of the contract between the two, but by whether the learner is employed or suffered or

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[27] It is, of course, not necessary to explore at this time the full limits of "suffer or permit to work." Thus, whether, as suggested by the court below in No. 336, the Act would not apply to the novelist, who sought work in respondents' train yards to aid him in the preparation of a novel, is a question which need not be answered on the present record. Whatever may be the full scope of "suffer or permit to work" it plainly encompasses the normal industrial pattern here presented. "And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526, quoting from *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467. Cf. *National Labor Relations Board* v. *Hearst Publications*, *supra*, at 130: "It is not necessary in this case to make a completely definitive limitation around the term 'employee.'"

permitted to work by the employer. In holding these trainees to be outside the scope of the statute, the courts below not only imported unwarranted limitations into Section 14 but failed to give effect to the statutory definition of the employment relationship.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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APPENDIX

Use of Words "Employed, Permitted, or Suffered To Work" in Child Labor Legislation at Time of Enactment of Fair Labor Standards Act

Alabama (Code 1940, title 26, ch. 7, Art. 3, sec. 343)
Arizona (Code 1939, sec. 56–301)
California (Labor Code, Div. II, Pt. 4, sec. 1290)
Colorado (1935 Stats. ch. 97, sec. 182)
Delaware (Rev. Code 1935, #3601, sec. 11)
District of Columbia (D. C. Code 1940, sec. 36–201)
Florida (Laws 1941, ch. 20955, sec. 3)
Idaho (Code 1932, Vol. 3, ch. 8, sec. 43–801)
Illinois (Rev. Stats. 1941, ch. 48, sec. 17)
Kansas (GS 1935, sec. 38–601)
Louisiana (General Statutes, sec. 4319)
Maine (RS 1930, ch. 54, sec. 18)
Maryland (Code 1939, Art. 100, sec. 4)
Michigan (Compiled Laws of 1929, sec. 8325)
Minnesota (Masons Stats. 1927, sec. 4094)
Missouri (Rev. Stats. 1939, sec. 9619)
Nebraska (Rev. Stats. 1943, sec. 48–301)
New Hampshire (Public Laws, ch. 118, sec. 18)
New Jersey (Rev. Stats. 1937, Ti. 34, sec. 2–2)
New Mexico (Code 1929, sec. 80–101)
North Carolina (P. L. 1937, ch. 317, sec. 1)
North Dakota (1923, ch. 155, sec. 1)

Ohio (Genl. Code, 1940, sec. 12993)
Oregon (Comp. Laws 1940, sec. 102–401)
Rhode Island (Pub. Laws 1936, ch. 2360, sec. 1)
Tennessee (Code 1932, sec. 5315)
Utah (1933, ch. 11, sec. 1)
Vermont (Pub. Laws 1933, sec. 6583)
Virginia (Code 1942, sec. 1808a)
West Virginia (Code, 1931, ch. 21, Art. 6)
Wyoming (Rev. Stat. 1931, sec. 20–301)

USE OF WORDS "EMPLOYED OR PERMITTED TO WORK" IN CHILD LABOR LEGISLATION AT TIME OF ENACTMENT OF FAIR LABOR STANDARDS ACT

Arkansas (Pope's Digest, 1937, vol. II, sec. 9067) (Acts 1915, p. 1505)
Connecticut (Genl. Stats. supp. 1939, sec. 1320e)
Georgia (Code 1933, Title 54, sec. 54–301)
Indiana (Burns' Stats. 1933, sec. 28–518)
Kentucky (R. S. (1942), ch. 339, sec. 339.010)
Mississippi (Code 1930, sec. 4645)
Montana (R. C. 1935, sec. 3095)
Oklahoma (Stats. 1931, sec. 10833)
Pennsylvania (Purdon's Stats. 1936, Ti. 43, sec. 42)
Wisconsin (1937, Special Session, ch. 6, sec. 2)
Massachusetts (Genl. Laws, 1932, ch. 149, sec. 60)

FEDERAL CHILD LABOR STATUTES USING WORDS "EMPLOYED OR PERMITTED TO WORK"

Act of September 1, 1916, c. 432, 39 Stat. 675
Act of February 24, 1919, c. 18, 40 Stat. 1057, 1138

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, RESPONDENT

BRIEF FOR THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SEPTEMBER, 1946.

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OPINIONS BELOW

The opinion of the District Court (R. 365-371) is reported at 60 F. Supp. 1004. The opinion of the Sixth Circuit Court of Appeals (R. 378-382) is reported at 155 F. 2d 1016.

QUESTION PRESENTED

Whether persons in training for positions as porters, callers, messengers, stenographers and clerks (commonly called "posters") and as firemen, switchmen and brakemen (commonly called "cubs") are "employees" of the Railway during their training period within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C.A. 201 et seq.

The question just stated is the identical question which the Sixth Circuit Court of Appeals found to be presented (R. 380) as distinguished from the petitioner's statement of the "question presented" in his brief at page 3.

STATEMENT OF THE CASE

The statement of facts contained in petitioner's petition (PP-4-11) is not the "Findings of Facts" made by the District Court (R. 365-371, 60 F. Supp. 1004) which were fully concurred in by the Sixth Circuit Court of Appeals (R. 378-382). On the contrary, petitioner's statement of the facts is a statement of facts that he hoped the courts below would find, but didn't.

Because of the inadequate and partial statement of the case in petitioner's petition (PP 4-11), the respondent (hereinafter called respondent or "Railway") deems it material to the consideration of the question presented, to set forth its statement of the case rather than undertake to supply matters material to the consideration of the question presented by isolated additions to and corrections of petitioner's statement. For this purpose, except for the absence of record references, respondent might well rest with the "Findings of Fact" of the District Court (R. 365-371, 60 F. Supp. 1004) which were concurred in by the Sixth Circuit Court of Appeals (R. 378-382).

The facts as to "trainees" or "cubs" in training for positions as firemen, and switchmen in yard service.

Persons seeking employment for positions of firemen or switchmen in Yard Service must fill out a written application, have a physical examination and train or "cub" for a period before being eligible for employment (R. 25-26, 40, 79, 300). This practice is of long standing with the respondent Railway and with the other railroads throughout the country (R. 50, 80, 300).

The training or "cubbing" is necessary in order that the "cub" may familiarize himself with the yard, signals, location of switches, making-up and breaking-up of trains, uncoupling

cars, etc. (R. 32-33, 50, 52, 80-81), and for his own safety and the safety of others (R. 33, 80). He is practically helpless when he starts "cubbing" (R. 29) and he could never "get anywhere without it" (R. 36).

The period of his "cubbing" is usually about 6 to 10 days, depending upon the aptitude, ability, prior experience and industry of the individual (R. 29-30, 39, 42, 48). No particular period of "cubbing" is required (R. 58) and it is carried on in good faith (R. 58, 315). The trainee's day's cubbing is usually one shift of 8 hours. However, occasionally, a person who is anxious to get on the "extra board" as soon as possible, has cubbed as much as a shift and a half (12½ hours) in a day (R. 30, 45, 216). At page 5 of petitioner's petition it is said that "cubs" *frequently* work 12 to 16 hours a day. It appears from the entire record that only one trainee-switchman cubbed longer than 12½ hours on any day. He "cubbed" 16 hours on two different days (R. 186-187) but he did this voluntarily in order to qualify sooner (R. 196).

The trainee "cubs" with a regular crew of employees some of whom instruct him and show him how to perform the duties of the job he is trying to qualify for and let him under their immediate supervision actually perform manual activities in order to learn (R. 46-47, 54, 55, 56, 211, 215, 219, 220). He must cub on different shifts to learn the yards, switches, tracks, etc. (R. 29-30, 224-225). When he thinks he has cubbed sufficiently and when he is okayed by the men with whom he has "cubbed" the trainee is then ready to go on the "extra board," and not before (R. 40, 41, 48, 49-50).

Whatever the "cub" does in the course of his training is for his sole benefit (R. 55-56, 58-59, 209, 211, 220, 221, 301). Everything that he does is something that a regular employee is there to do and paid to do (R. 55, 56, 65, 82, 211-212, 220). The cub performs no beneficial service to the Railway. In fact, he is in the way and delays the work being performed (R. 29, 33,

54-55, 56-57, 82). The crew with whom he is "cubbing" had rather not have him (R. 56-57).

He comes and goes when he pleases (R. 57, 58, 94-95, 209, 221, 223). He has no duties and no responsibilities (R. 56, 82, 220, 301). He is subject to no rules or discipline applicable to "employees" (R. 57, 83, 97, 301). His presence as a "cub" is purely voluntary (R. 50).

The "cub" understands when he files his application that he must "cub" before becoming an "employee"; that he is not an "employee" while a "cub"; and that he is not an "employee" until after he completes his cubbing and gets on the "extra board" or "roster" of "employees" (R. 28-29, 40, 48, 49-50, 82, 219, 220, 312).

The application carries with it no obligation to employ the applicant (R. 48) and he is under no obligation to complete his "cubbing" (R. 39). He has no status as an "employee" and is not considered as an "employee" until after he completes his training and goes on the "extra board" or "roster" of "employees" (R. 49-50, 312). During such training period the Railway is under no obligation to employ and the trainee is under no obligation to accept employment (R. 50). He is entitled to no seniority rights while "cubbing." That starts after he completes his cubbing and gets on the "extra board" or "roster" of employees (R. 50, 59, 82). If he never gets on the "extra board" he never gets acquainted with "seniority" (R. 82).

The trainee's status is not touched by any contract or wage agreement between the Railway and its employees (R. 50), and he does not enjoy the regular fixed contractual wage scale until after he completes his "cubbing," gets on the "extra board" and goes to work (R. 50, 85-86) and he fully understands that before beginning his training (R. 50).

The railway brotherhoods, which the "cub" may join after becoming an employee, treat him as a "cub" in training and not as an "employee." They refer to his "cubbing" as a "pre-employment training period" (R. 85).

The facts as to "trainees" or "cubs" for positions as firemen and brakemen in road service.

Persons seeking employment for positions of firemen or brakemen in road service must fill out a written application, have a physical examination, go through a period of training (called "cubbing"), and pass a written examination before being eligible for employment (R. 79, 229, 235, 258, 280, 300, 302, 312). They are so advised when they fill out their application (R. 235, 258, 280). This practice is of long standing with the Railway and with the other railroads throughout the country (R. 50, 80, 300).

It is necessary that trainees undergo a "cubbing" period in order to become familiar with the road, stations, grades, side tracks, switch tracks, block signals, industry tracks, branch line connections, etc. (R. 80-81, 237, 300, 301, 302, 322, 336, 352) *and for their own safety and the safety of others* (R. 80, 82, 300, 302). As one witness stated, when a person starts cubbing "it is just like a blind man" (R. 231). There is no other way to qualify (R. 80-81, 279). "You have to take hold if you ever learn" as one of petitioner's witnesses put it (R. 279).

All witnesses introduced by the petitioner in reference to "cubbing" in road service were from Nashville, Tennessee (R. 226, 240, 259, 269, 273, 278), who "cubbed" on two divisions of the Railway System, e. g., the Chattanooga and the Nashville Divisions, covering a total road mileage of 323 miles (R. 236-237). The average "cubbing" period for position of brakeman was about three weeks (R. 240, 260, 271, 274) and thirty to thirty-five days for position of fireman (R. 227, 278, 351). Petitioner makes reference in his petition (P. 6) to one person who cubbed seven weeks for position as fireman. He should have stated that this is because the person cubbed on two divisions, cubbed 35 days, which enabled the person, upon becoming employed, to establish seniority on both divisions of the Railway (R. 92, 318). Trainees did not "cub" longer than necessary (R. 235, 315, 337, 353). *Not a single witness claimed that he got too much cubbing.*

Trainees usually "cubbed" about eight to twelve hours per day in road "cubbing." If they were "cubbing" on through trains the period was less than eight hours. If on locals the period did not exceed twelve hours, except occasionally when the train would be late on schedule (R. 231, 246, 253, 262, 263).

The trainee "cubs" with a regular crew of employees some of whom instruct him and show him how to perform the duties of the job for which he is qualifying and let him actually perform manual activities in order to learn (R. 81, 94, 232-233, 256, 258, 277, 279, 280-281, 352). One of petitioner's witnesses complained that some of the regular firemen would not let him do as much of the actual work as he wanted to do in order to learn (R. 237).

Whatever the "cub" does in the course of his training is for his sole benefit (R. 209, 211, 235, 238, 256, 281, 301, 352). Everything he does is something that a regular employee is there to do and paid to do (R. 82, 235, 238, 256, 258, 277, 281, 338). The cub performs no beneficial service to the Railway (R. 82, 94, 281, 336). If a train starts from Nashville, Tennessee, to Chattanooga, Tennessee, and the cub leaves the train somewhere en route, the train goes on just the same (R. 82, 337, 352). Only one of the group of witnesses introduced by the petitioner thought that his presence on the train as a "cub" was a benefit to the Railway (R. 245). Some thought they were a liability to the Railway while "cubbing" (R. 235, 352).

When the trainee begins his "cubbing" he is furnished a schedule which it is desired that he follow but he is not required to follow any schedule. He may "cub" at his pleasure. If he starts on a trip and decides to get off en route and go home or elsewhere, he is free to do so. He may "cub" a day and lay off for a while if he chooses. The whole thing is optional with him (R. 94-95, 272, 323, 336, 353, 355, 358). *Generally the "cubs" do not follow the schedule* (R. 323).

The main purpose in furnishing a "cub" a schedule which it is desired that he follow, is for the convenience of the "cub"; to avoid more than one "cub" being with a crew at the same time; to

be able to locate him in case of sickness in his family or other personal emergency; and to aid him in familiarizing himself with all parts of the road over which he is to make his runs after becoming an "employee" (R. 323).

The "cub" has no duty and no responsibility. These rest with the regular employees (R. 82, 237-238, 257, 281, 301, 336, 353). He is subject to no rules or discipline applicable to employees (83, 97, 301). He understands that he is not an "employee" at the same time that he is a "cub," and that he cannot become an "employee" until after he completes "cubbing" and that "employment" follows training, written examination and getting on the "extra board" (R. 79, 235, 258, 276, 280, 312, 356, 359).

The Railway has never considered a person an employee while "cubbing" (R. 82, 312). The trainee is under no obligation to complete his training and become an employee (R. 258, 312). Whether or not he qualifies is optional with him. *In fact, a pretty large percentage of the trainees quit before completing their cubbing* (R. 347). He is not entitled to seniority rights while "cubbing." Seniority is established when the trainee completes his "cubbing," passes a written examination and gets on the "extra board" of "employees." If he never gets on the "extra board" he never gets acquainted with "seniority" (R. 82).

The Brotherhood of Trainmen does not consider that a "cub" is an "employee." It refers to "cubbing" as a "pre-employment train. g period" and its contracts as to wages and working conditions do not embrace "cubs" (R. 50, 85-86).

The facts as to payments to "trainees" or "cubs" for positions as firemen, brakemen and switchmen both in yard service and in road service.

Prior to December 1, 1943, the Railway did not pay anything to trainees for the position of firemen, brakemen and switchmen (R. 20, 22-23) and trainees who "cubbed" prior to December 1, 1943, understood that they would receive no monetary reward for the period of their "cubbing" (R. 50, 182, 210-211, 219, 235, 258, 280, 319-320, 351).

In 1943 there was a National Committee composed of representatives of Labor Brotherhoods and Railroad Executives to consider, among other things, the question of recommending that the railroads of the country consider the policy of making voluntary payments to trainees during their "cubbing" period which the said joint committee referred to as "pre-employment training period" (R. 84-85).

Realizing that the war had drawn into the service a large toll of young men and single men, leaving mostly older men with families and dependents to qualify for positions of firemen, brakemen and switchmen, and that they would need subsistence money during their "pre-employment training period," the Railway adopted the recommendation of the National Committee and adopted the policy effective December 1, 1943, of making voluntary payments of $5.00 per day to trainees during their "cubbing" period (R. 42-43, 48-49, 75, 76, 83, 84, 297, 311, 320). Effective about 15 days later (December 15, 1943) the Management slightly changed the policy so as to provide that if a trainee quit before completing his "cubbing" he would not receive this expense payment of $5.00 per day (R. 76, 83, 298, 312, 313, 320). This policy continued until about January, 1945, when the Management reverted to the policy originally established December 1, 1943, of making these voluntary payments irrespective of whether or not the trainee completed his "cubbing" (R. 77, 78, 83, 299, 313, 321) and instructed that all persons be paid, who had not been currently paid five dollars a day since December 1, 1943, because they quit before completing their training, which was done (R. 77, 78, 83, 298-299, 313, 314, 322, 347). Of the 475 who had "cubbed" since December 1, 1943, 406 received the five dollars currently and the 69 who were not paid currently, because they failed to complete their training, were paid by vouchers issued by the Accounting Department (R. 347).

The reason the Management reverted to the original policy of paying five dollars a day to trainees, whether or not they completed their "cubbing," is that several trainees complained that they understood all along that they would receive this amount

regardless of whether they completed their training. The Management desired that they be satisfied and that a policy be established that would not be confusing and could not be misunderstood (R. 77, 83). The fact that this lawsuit was pending did not influence the policy or decision of the Management (R. 83).

The result of the changed policy and instructions above stated is that since December 1, 1943, all trainees have been paid five dollars per day during the period of their "cubbing" and records kept of the days and hours of their "cubbing" (R. 78, 299, 312, 322, 347).

The payment of $5.00 a day is purely a voluntary payment on the part of the Railway (R. 83-84, 95). It is not "wages," but the gift of expense payment (R. 43, 78, 311-312). It does not include any amount for overtime (R. 84). If it were "wages" the amount of the payment could not have been fixed solely by the Railway. On the contrary it would have been fixed by collective bargaining, mediation and arbitration (R. 85, 86). It is not a contractual wage and it does not follow the trainee into service as an employee (R. 85). When he becomes an employee he draws the regular contractual wage of "employees" which is greatly in excess of the expense payment of five dollars (R. 85-86). His status while "cubbing" is not reached by any wage agreement between the Brotherhood and the Railway (R. 50). The Brotherhood does not recognize the "cub" as an employee (R. 85-86).

In no instance is there either claim or evidence that the daily cubbing period of any of the trainees for positions of switchmen, brakemen and firemen averaged as much as, or more than 12½ hours, i. e., that the payment of $5.00 per day equalled less than 40c an hour.

The facts as to "trainees" or "posters" for positions as stenographers, clerks, messengers, callers and porters.

Persons in training to qualify for positions as stenographers, clerks, messengers, callers and porters are known in railroad parlance and generally referred to in the record as "posters" (R. 109).

Applicants for positions of clerk, stenographer, caller, messenger and porter are required to qualify by undergoing a period of training or "posting" (R. 149). Such training or "posting" is necessary in order that the trainee may learn the duties of the job applied for (R. 152, 153, 153-154, 155, 156) and in instances, such as callers and yard clerks whose duties call them into the yards among engines, trains and cars, the training period is necessary for the *safety* of the persons seeking such jobs (R. 155, 302, 303).

The trainees for either of these positions "posted" with a regular employee and learned by listening to and watching the employee and by doing some of the employee's work in order to learn it (R. 105, 115, 116, 117, 131, 146). The Trainees "posted" for their own benefit and did nothing that a regular employee was not there to do and paid to do (R. 116, 119, 133, 134, 135, 137, 173). They understood that they were not employees while posting, but were just there training and learning (R. 118-119, 142-143). They were free to post when they pleased and at their convenience (R. 114, 118, 128, 129, 139). Some held regular jobs elsewhere and "posted" irregularly at their convenience (R. 114). They came when they desired and left when they desired and were free to select their own hours (R. 118, 129, 139, 143). Such persons, while training, were of no benefit to the Railway. Their presence required the regular employee to stop and instruct. It slowed up the regular employee (R. 117, 118). *Not a single witness thought that he was beneficial in any way to the Railway while "posting."*

Persons applying for any of these positions were not required to post longer than necessary (R. 158). The average period of posting was about a week for position of clerk, about 5 or 6 days for position of stenographer, about 2 days for job of porter, about 1 to 3 days for job of caller and about 3 days for job of messenger (R. 151-156). The period of posting depends largely upon the ability, aptitude and industry of the individual (R. 153, 154-155, 156, 157).

Some of the applicants for position as clerk "posted" for some two or three different types of clerical positions so as to be more certain of employment later. For example, one applicant posted 5 or 6 days for position of train clerk, two or three days for position of yard clerk and a similar period for position of record clerk (R. 106, 111). Substantially the same is true of another applicant, except that this applicant "posted" for a longer period on account of the fact that he was less apt and much slower to learn (R. 132-135, 157-160). The same is true of still another person who claimed to have posted for a longer period than the average (R. 160-161). In only two or three isolated instances did any person train for position of clerk longer than about a week. They are referred to in petitioner's petition (p. 7). In that connection petitioner might have further stated that these isolated cases resulted from the person training for three different types of clerical jobs and the more important reason that the particular persons were unusually slow to learn (R. 106, 111, 132-135, 157-160).

Likewise, the instance referred to in petitioner's petition at page 7 as to one person training 24 hours a single day for a clerk's position (R. 139) is but a single isolated instance which in no way reflected the usual practice. Petitioner could have further pointed out that this particular person was not required to "train" or "post" for 24 hours. He did it voluntarily. He could have quit at any time (R. 143).

Again at page 9 of the petition the statement is made that the record shows that the chief clerk at Chattanooga testified that it sometimes took him a week to teach them [porters] how to use a broom, thereby leaving the impression that the Railway sometimes requires a cub-porter to train for a week with a broom before employing him. What the chief clerk actually said was: "I have got one boy now that has been there a week and he don't know how to use a broom" and that he is not still cubbing but is on duty (R. 152).

Further efforts to correct petitioner's statement of facts will not here be indulged in. Respondent relies upon the facts as

found by the courts below and not upon the facts as insisted upon by petitioner which were rejected by the courts below. (R. 365-371, 60 F. Supp. 1004; R. 378-382).

The facts about payments to "trainees" or "posters" during the period of their training.

Following the passage of the Fair Labor Standards Act in 1938, the Railway adopted the policy of complying with the Act *as if* it applied to "posters," because of the possibility that persons while training *might* perform some beneficial service while posting and it was seeking to avoid any possible violation (R. 89), although the judgment of its officers was that persons while "posting" are "posters" and not "employees." (R. 88).

About 1944 or 1942 the Assistant General Manager (now General Manager) issued instructions to the various Superintendents of the various Divisions throughout the Railway System to pay persons while "posting" an amount equal to the minimum provided by the Act and to keep records as provided by the Act (R. 86, 293, 310).

Prior to these instructions there had been no "posting" subsequent to the effective date of the Act, because business was off and regular employees were being laid off (R. 86, 311).

The instructions were received by the Superintendents who in turn delivered them to the proper subordinate officials for execution (R. 294, 311).

The policy and instructions above referred to were carried out throughout the entire Railway system, except at Chattanooga, Tennessee, and as to a single person at Fayetteville, Tennessee (R. 87, 101, 295, 296, 311), and long before the Management had any knowledge that the Administrator would undertake to apply the Act to "posters" (R. 86, 293, 310). Said policy and practice have remained in effect continuously since their adoption (R. 74, 88, 151, 162, 295, 311).

At Chattanooga, Tennessee, the Superintendent of the Chattanooga Division instructed his chief clerk at Cravens Yard in

Chattanooga to pay persons while "posting" and to keep records in accordance with the provisions of the Fair Labor Standards Act (R. 170, 294) and both the Superintendent and the Assistant General Manager thought the instructions were being carried out (R. 86-87, 294). The chief clerk failed to carry out the instructions through oversight in the rush of war business (R. 170).

As soon as the error at Chattanooga was brought to the attention of the Management in the fall of 1944, the error was corrected, and the practice changed to conform with instructions of long standing and with the Railway's system policy and practice elsewhere throughout its entire system (R. 87-88, 161, 295). Since the latter part of 1944 the Railway has been currently paying persons at Chattanooga (as elsewhere on the system) a minimum of 40 cents an hour during the period of their "posting" and keeping records of the days and hours of "posting" (R. 88, 161, 162, 172, 175-176, 295, 311, 348-349).

The Trial Court found and concluded as to "posters" that "the Company is now and for several years past has been complying with the Act as to them, and apparently intends in good faith to do so in the future" (R. 370, 60 F. Supp. 1004, 1007-1008). Not only is this finding supported by abundant evidence, but there is *no* evidence to contradict it.

ARGUMENT

Reasons for denying the Writ.

1. There is no conflict in the decisions of the Courts of Appeals or in any of the District Courts anywhere on the question here presented, even though the question here presented has been decided by four District Courts and three Circuit Courts of Appeals at the instance of a single person (the Administrator of the Wage and Hour Division, United States Department of Labor) in each case.

2. The petition presents no important question of law which should be settled by this Court.

3. The Sixth Circuit Court of Appeals has not decided a federal question in a way probably in conflict with applicable decisions of this court and its decision is obviously correct.

A.

No conflict in decisions below.

The Administrator first presented the question here presented to the District Court of the United States for the Southern District of Florida (Walling v. Jacksonville Terminal Company, 55 F. Supp. 302) which court decided the question adversely to the Administrator May 6, 1944. On appeal the Fifth Circuit Court of Appeals affirmed the decision of the Court below April 23, 1945 (148 F. 2d. 768).

While the Jacksonville Terminal case was pending and before decision by the Fifth Circuit the Administrator instituted the instant suit in the District Court at Nashville, Tennessee, which was decided June 18, 1945 (60 F. Supp. 1004), and later affirmed by the Sixth Circuit June 1, 1946 (R. 378-382).

Likewise, the Administrator filed suit against the Portland Terminal Company in the District Court of Maine, Southern Division (Walling vs. Portland Terminal Company, 61 F. Supp. 345) again presenting the same question here presented and said court decided that case adversely to the Administrator June 18,

1945, which decision was affirmed by the First Circuit Court of Appeals April 29, 1946 (155 F. 2d 215).

Still another suit was instituted by the Administrator against Norfolk Southern Railway Company in the District Court of the United States for the Eastern District of North Carolina (unreported) again presenting the same question here presented, which was decided against the Administrator July 9, 1946.

Thus it is to be seen that the Administrator has presented the question here presented to seven different Courts (4 District Courts and 3 Circuit Courts) and on similar facts in each case all of the seven courts have reached the same decision, hence there is no conflict in decisions for this court to decide.

B.

The petition presents no important question of law which should be settled by this Court.

At page 13 of the Administrator's petition it is said of the decisions of the courts below: "moreover, they open a widespread area of doubt as to the applicability of the Act to other industrial training programs." Respondent respectfully submits that exactly the opposite is true. The fact that seven different courts have reached the same decision on the question here presented closes any area of doubt as to the applicability of the Act anywhere where the question, if any, is substantially the same as the question here presented and already decided by seven courts.

Petitioner's argument that the question presented in this case is of grave importance almost vanishes when it is noticed that the very first suit he brought seeking to have trainees of the Jacksonville Terminal Company (55 F. Supp. 302, 148 F. 2d 768) brought within the scope of the Act, he did not choose to hasten a decision of the question by filing a petition for writ of certiorari in that case. That case was decided by the Fifth Circuit almost one year ahead of the decision by the Sixth Circuit in the instant case. If he considered that the question is of grave importance and should be decided by this court, he could have saved a lot of

valuable time by following through with the Jacksonville Terminal case instead of abandoning that case and prosecuting suits involving the same question in three other distinct circuits.

At page 13 of the Administrator's petition it is said: "The importance of this question is indicated by a National Industrial Conference Board survey of 473 companies with a combined employment of 626, 668, which revealed that four out of five companies had definite training programs. *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20." It is significant to note that the survey referred to was in 1937 in a year before the Act was approved June 25, 1938. It is no easy task to understand the Administrator's suspicion that the uniform decisions of the courts below will open a widespread area of doubt among other industries unless writ of certiorari is granted in the instant case which does not involve the industrial training program of other industries. The decisions of the lower courts do not seem to have disturbed anyone to date, except the Administrator. Petitioner points in his petition to no instance of such disturbance. The record in this case shows none. Industry is not frightened by the decisions. Labor unions seem to be satisfied with them. They do not consider that these volunteer learners are "employees" (R. 50, 85-86). No alarm is sounded by "employees" and none by the "trainees."

In Walling vs. Norfolk Southern Railway Company (unreported), supra, the District Judge said:

"No complaint of the acts and omissions of the defendant concerning the matters involved in this controversy was made in any quarter prior to the filing of complaint in this case, and no complaint has come from any other quarter since such filing."

Everybody seems satisfied with the decisions below, except the Administrator. It is respectfully submitted that the old 1937 survey made by the National Industrial Conference Board before the Act was passed, belatedly dug up after the trial in the District Court presents no basis for the fears manifested by the Administrator.

C.

The decision of the Sixth Circuit Court of Appeals is obviously correct and it is not in conflict with applicable decisions of this Court.

At the outset and for the Court's convenience, respondent calls attention to the "Finding of Facts" of the courts below stated in the Circuit Court decision (R. 379-380) as follows:

"Upon the question whether such persons are trainees or employees, the court found the following facts;

" 'When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay therefor under the labor contracts. Students are present on the job, solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up

a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called.'

"Without going into detail, we conclude that these findings have ample support in the evidence. They are certainly not 'clearly erroneous' and we are bound by them. See Federal Rules of Civil Procedure, Rule 52 (28 USCA following 723c). We have heretofore consistently followed this rule. Hazeltine Corp. v. Crosley Corp., 130 Fed. (2d) 344 (C.C.A. 6). *There is indeed no special controversy over the facts.*"*

1. The facts as found by the District Court and concurred in by the Circuit Court will be accepted by this Court.

See:

Skidmore v. *Swift*, 323 U.S. 134, 137.
Armour & Co. v. *Wantock*, 323 U.S. 126, 134.

Under the Act the duty or power to find the facts does not rest with the Administrator (*Kerschbaum* v. *Walling*, 316 U.S. 517, 523).

2. Based upon the facts as found by the courts below the Sixth Circuit Court said (R. 380-381):

"Section 3 (c) of the Act defines 'employee' as an individual employed by an employer; and Sec. 3(g) defines the word 'employ,' to mean 'to suffer or permit' the trainees to work. See *Walling* v. *Sanders*, 136 Fed. (2d) 78, 81 (C.C.A. 6). Appellant's difficulty here is that the findings conclusively establish that appellee did not 'suffer or permit' the trainees to work *for it*. See *Walling* v. *Jacksonville Terminal Co., supra* (148 Fed. 2nd, at page 770). The fact that the trainees necessarily used the facilities of appellee during their training period does not carry an inference that they worked for appellee. *If trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away.* The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we are satisfied with the reasoning thereof. To say more would constitute surplusage." (Emphasis supplied).

*All italics ours unless otherwise indicated.

In holding that the "trainees" are not "employees," the district court's opinion (60 F. Supp. 1004) states at pages 1006-1007:

> "For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon the principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied. It is indispensable to the existence of such a contract that the employee perform some service for the benefit of the employer, or in his interest, of which the payment of wages is the quid pro quo. The performance of such a service is here wholly lacking, as is all other indicia of employment, including the authority to direct and control the activities of the trainee. Thus during their training period these trainees act only for their own benefit and in their own interest. Their activities are wholly voluntary. No measurable benefit flows to the Company, for which the law would imply an obligation to pay. It is in this respect that this case fundamentally differs from *Walling* v. *American Needlecrafts*, 6 Cir., 139 F. 2d 60, relied upon by plaintiff. There the workers labored and produced for the benefit of the employer in circumstances in which the law will imply an obligation to pay them, even though their work was not performed under the direct supervision of the employer. Here, the trainee works, not for the Company, but for himself and produces nothing of benefit to the Company. The law therefore implies no obligation to pay him."

In the Jacksonville Terminal case, supra (148 F. 2nd 768), the Court in pointing out that the Fair Labor Standards Act must be applied in the light of "common sense" said at page 770:

> "To permit another to work in my shop in making or repairing something for himself, would not make him my employee. *The words 'suffer or permit to work' must be understood with common sense.* In the present case the Company did suffer the trainee to work on its premises and with its appliances, but the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw

switches or transmit signals, it was for his instruction. The Company was not benefited, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee."

If the Act is as broad as the Administrator contends then it completely obliterates every concept of voluntary apprenticeship which has been recognized generally in this country since the days of Plymouth Rock and Salem. If these "trainees" are "employees" as contended by petitioner "then the long entertained concept of voluntary apprenticeship passes entirely away" as pointed out by the Sixth Circuit (R. 381) and there is no longer any such thing as a "student", "cub", "learner" or "trainee" in industry as distinguished from an "employee."

3. If one has not hired another expressly nor suffered or permitted him to work *under circumstances where an obligation to pay him will be implied* they are not employer and employee under the Act.

Bowman v. *Pace*, 5 Cir., 119 F. 2d 858, definitely and directly involved the question of whether Bowman, the watchman plaintiff, was an employee of Pace, the wholesale grocer defendant, *as a watchman*. In holding that he was not an employee of Pace, the Court said at page 860:

> "If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, not suffered or permitted him to work *under circumstances where an obligation to pay him will be implied*, they are not employer and employee under the Act."

The italicized words make all the difference in the world. Were it not for this distinction the construction advocated by petitioner would in the words of the Court in *Walling* v. *Sanders* (136 F. 2d 78, 81) embrace "not only those who work for the employer but encompass all employed humanity." Any broader construction than indicated by the italicized words would render business men liable for the standard of wages not only of their

bona fide employees but also of independent contractors, employees of independent contractors, employees of strangers and mere volunteers; and it would render instructors liable to pay for the work of their pupils. It would make a housewife liable to the salesman of a vacuum cleaner if he comes to her home and she "suffers or permits" him to clean the living room rug as a part of his demonstration. A school which "suffers or permits" a student to practice and engage in football, which is hard work, would be liable for the standard of wages provided in the Act if petitioner's version be accepted. Such would be some of the absurd conclusions logically following from upholding the administrator's contention with respect to the meaning of Sec. 3(g) of the Act.

Further authority for the propositions that employment within the meaning of the Fair Labor Standards Act is premised upon a contract under which wages become due and that "suffer or permit to work" has reference only to work under circumstances involving wage liability is found in the case of ***Helena Glendale Ferry Co. v. Walling,*** Administrator (1942), 8 Cir., 132 F. 2d 616. In that case a man named Johnson owned most of the stock in the Ferry Company and also a plantation upon which he employed a foreman. In addition to his plantation duties, the foreman under Johnson's orders hauled coal and built road approaches for the ferry company. He was paid only by Johnson. Upon these facts the foreman was found to be Johnson's employee and to be not employed by the ferry company within the meaning of the Fair Labor Standards Act even though it suffered the foreman to do work for it. At page 620 the court said:

> "The Act defines an employee as 'an individual employed by an employer' and the word 'employ' as used in the Act includes 'to suffer or permit to work'. But since the obvious purpose of the Act is to establish minimum wages and maximum hours the words last quoted cannot be interpreted to include as an employee *one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages, Bowman* v. *Pace Company, 5 Cir., 119 F.2d 858.* The evidence wholly fails to disclose any right in

the ferry company to require Marvin Johnson to work at any time nor any obligation upon the ferry company to pay him wages for the services which he occasionally renders it."

The case of *Schroepfer* v. *Abell Co.* (1942) D.C., D. Maryland, 48 F. Supp. 88, affirmed (1943), 4 Cir., 138 F. 2d 111, involved the question of whether rackmen who sold newspapers through vending machines for which they paid a rental to the newspaper company and which credited them with receipts turned in less the cost of the papers and plus a weekly allowance of $25 for use of car, were employees under the Act and it was held by Chestnut, J., that such rackmen were independent contractors and not employees. At page 94, the opinion reads:

"The statutory definitions of 'employer,' 'employee,' and 'employ' are in very general terms, and should be understood 'in their natural sense, and intended to describe the conventional relation of employer and employee.' *Robinson* v. *Baltimore & O. R. Co.*, 237 U.S. 84 . . . The definition is too general to expressly solve the particular problem. We must therefore look to the provisions of the act as a whole to determine whether such a relationship as existed between the parties to this case constituted the Schroepfers employees of the defendant and thus entitled to the benefits of the Act," and later, on the same page:

"The Act thus contemplates (a) a situation in which the employer, expressly or impliedly, agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee, because by 29 U.S.C.A. 211(c) it is further provided that the employer must keep written records of the number of hours of work by the employees respectively."

This case is authority for the proposition that some sort of an employment contract must be made and form the basis of wage liability before the kind of employment relationship intended by the Act can exist. Such a contract need not be express, but the facts must not negative the existence of wage liability. It is interesting to compare the Schroepfer Case (supra) with *National Labor Relations Board* v. *Hearst* (1944), 322 U.S. 111, 64 S. Ct. 851, in which case the Supreme Court held that newsboys

were employees of a newspaper within the meaning of the Wagner Act. It is evident, first, that each case must be carefully analyzed on its own facts to support a legal conclusion as to whether a particular person stands in relation to another as independent contractors or employee, and second, that weight will be given to the purposes of the particular act and the subject regulated. Illustrative of this is the following language used by the Court at page 124:

> "Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow, technical, legal relation of 'master and servant' as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others."

Newsboys other than temporary, casual or part time newsboys were found to be an integral part of the publisher's distribution system; they thought of themselves as employees and the newspaper company so regarded them; they worked for the newspaper company and performed services of value to it and their work was supervised by the publisher or its agents. Unquestionably their close economic relationship to the publisher, the permanence of the arrangement and the necessity of bargaining collectively with it, were factors which led the Court to find that they were employees under the Wagner Act. However, the case is readily distinguishable from the Schroepfer Case on many counts but partly because the subject with which the Fair Labor Standards Act is concerned is not collective bargaining but an employment relationship such that wage liabilities arise.

Comparison of these two cases illustrates not only the weight given to the subject regulated by the particular statute but the importance of thorough analysis of facts in each case and the al-

most controlling weight to be given to the findings of the trial judge or board in the first instance. These contentions are thoroughly vindicated by the action of the Supreme Court, which had on January 17, 1944, 321 U.S. 763, denied petition for writ of certiorari in the Schroepfer case, in refusing on May 22, 1944 (322 U.S. 770), to rehear petition for certiorari in that case brought by reason of the decision in the Hearst case handed down on April 24, 1944.

4. This court has held that to constitute work or employment under the Act here involved there must be physical or mental exertion "controlled or required by the employer, and pursued necessarily and primarily for the employer and his business" (Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 598; Jewell Ridge Corp. v. Local, 325 U.S. 161, 164-166). These cases answer petitioner's argument (p. 17 of the petition) that: "It is difficult to see how the Act's coverage can be made to depend on the existence of a 'primary or necessary benefit' to the employer as against the employee."

After asserting that the coverage of the Act cannot be made to depend on the existence of a "primary or necessary benefit" to the employer, the petitioner labors at length in his petition (pp. 17-19), without having any record references to cite, to point out a primary or necessary benefit to the employer of these trainees, and he gets no further than insinuations and accusations. On page 18 of the petition it is said: "It is difficult to understand the payment of four or five dollars a day to trainees during the war in the absence of any benefit to the respondent." These insinuations are taken care of by the opinion of the District Court (60 F. Supp. 1004) in its findings of fact at page 1007 as follows:

> "These payments were commenced in 1943, not because the Company considered that the trainees performed services of value, but pursuant to the recommendation of a joint committee of railway and labor executives, which committee referred to the payment as 'pre-employment' pay, and recommended that the payments be made because many of these trainees were married men with dependents who could not afford to undergo a period of training without some source of income. In mak-

ing the payments the Company regards them as incentive pay, not wages."

The above findings by the court have ample support in the record (R. 42-43, 48-49, 75, 76, 83, 84, 297, 311, 320). In fact there is no evidence to the contrary. On similar facts the First Circuit Court of Appeals reached the same decision in the Portland Terminal Co. case, supra, (155 F. 2d. 215, 218-219).

In the instant case it is perfectly obvious that the trainees, who come and go as they please; who are volunteers; who have no duty or responsibility; who are not subject to any rules of discipline applicable to employees; who understand that they are not 'employees' while 'trainees'; who train for their own benefit; who are of no benefit to the Railway while training; who are under no obligation to complete their training; who understand that the Railway is under no obligation to later employ them; who have no seniority; who are not included in any employment wage contracts; who are called students in a 'pre-employment training period' by organized labor; and whose time and presence are not controlled or required by the Railway, are not employees and their activities are neither *controlled or required* by the Railway, nor are they pursued *necessarily and primarily* for the benefit of the Railway and its business.

5. The cases relied upon by petitioner are far afield. The preponderance of cases cited by the Administrator are "tort" cases (Petition, p. 20). None of them involve the question here presented and none of them involve the question of who is or is not an employee for the purpose of applying the minimum wage and record keeping provisions of the Act. The tort cases were pressed upon the courts below. The District Court answered them (60 F. Supp, 1004) at pages 1006-1007 as follows:

> "For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon the principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied."

Likewise, in the Jacksonville Terminal Case (148 F. 2d 768), supra, appellant pressed on that court numerous *tort cases* arising under the Federal Employers' Liability Act. In holding that such cases are "far afield," the court said at page 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by *persons in training* are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the *touchstones for this Act*, which relates *only* to the *wages to be paid employees*. We repeat what we said in *Bowman* v. *Pace*, Supra, (119 F. 2d 861), that 'wages are due according to principles of contract, not of tort'."

In Bowman v. Pace (119 F. 2d 858), supra, the court said at page 861:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Farsyth was not an independent contractor, citing especially 39 C. J., Master and Servant, p. 38; *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co.* v. *Smeltzer*, 6 Cir., 88 F. 2d 94, 112 A.L.R. 74. These cases and those cited by C. J., relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680."

The danger in using cases under one statute for the purpose of construing a wholly different statute is clearly stated in *National Labor Relations Board* v. *Hearst Publishing Company*, 322 U. S. 111, relied upon by petitioner, wherein the opinion states at page 122:

> "It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; *and that within a single jurisdiction a person who, for instance,*

is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation. See, e.g., *Globe Grain & Milling Co. v. Industrial Comm'n,* 98 Utah, 36, 91 P. 2d 512. In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards,' does not exist."

We believe that the cases, already cited under this heading fully refute appellant's argument that *tort cases* are controlling, or even useful, in determining whether or not a "trainee" is an "employee" to whom "wages" are due under the Fair Labor Standards Act, a wholly different type of statute dealing with a wholly different problem.

Next petitioner relies upon *Tennessee Coal and Iron R. Co.* v. *Muscoda Local,* 321 U.S. 590 (Petition, p. 18-19). That case did not involve the question here presented. The relationship was admitted and the contest was as to what constituted working hours. The decision was finally rested on the particular findings of fact. It received consideration in the Jacksonville Terminal case, supra, (148 F. 2d 768, 771) and was distinguished and held inapplicable to the question here presented.

The particular facts of that case were so far different to the facts in the instant case that similarity is not to be found. There the trips were under the strict control and supervision of the company. Miners were not permitted to walk rather than ride. Regular schedules were fixed; loading and unloading were supervised; the speed of the trips was regulated; and the conduct of the miners during the ride was prescribed. The miners carried most of the equipment with which they worked, including fifty-pound sacks of dynamite, dynamite caps, gallon cans of oil, etc., to and from the mine surface and the work surface daily. Frequently the miners were required to stop between the mine surface and work surface and perform work for the company. This travel was compulsory and at all times under the strict control and supervision of the company. Admittedly they were employees, and the only question was in computing working time. None of the facts appearing in the Muscoda case, appear in the instant case. Indeed,

the facts are exactly to the contrary. Here respondent exercises no control over the trainee. He comes and goes when he pleases and however he pleases. No control is exercised over his activities. Whatever he does is for his sole benefit and purely optional with him. He has no duties or responsibilities and is subject to no rules or discipline applicable to employees. His time is his own. No two cases could be more different than the Muscoda case and the case here presented.

Jewell Ridge Coal Corp. v. *Local*, 325 U.S. 161, is as far afield as the Muscoda case and relied upon by petitioner (p. 19), for the same reasons. Likewise, *Anderson* v. *Mt. Clemens Pottery Co.* cited in the petition (p. 19), 326 U.S. 706, 149 F. 2d 461, does not deal with the question here presented. The same is true of *Armour & Co.* v. *Wantock*, 323 U.S. 126, cited by petitioner (p. 18).

Finally, petitioner cites *National Labor Relations Board* v. *Hearst*, 322 U.S. 111 (Petition, p. 21), involving the question whether "newsboys" distributing papers on the streets were entitled to "collective bargaining" under the provisions of the National Labor Relations Act. The Fair Labor Standards Act was not involved. In sustaining the Board finding that for the purpose of collective bargaining they were employees under the National Labor Relations Act, the court said at pages 131-132:

> "In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.' The Board concluded

that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion."

Again respondent insists that plainly the Hearst case bears no similarity to the case here for consideration. The facts are entirely different and the two cases arise under entirely different statutes setting up different remedies and covering different fields. Here the record sustains the courts' findings that trainees are not employees and there is ample basis in law for their conclusion.

The Hearst case received consideration in the Jacksonville Terminal case, 148 F. 2d 768, supra, wherein the court held it had no application (page 771).

We respectfully submit that none of the cases relied upon by appellant support his contentions in the instant case and all of them are far afield.

Section 14 of the Act is applicable only when learners are employed.

Section 14 of the Act does not *employ* learners, apprentices, messengers and persons otherwise handicapped. It only sets up machinery by which the employer *may* employ such persons at subminimum wages. The entire Section 14 deals with the *employment* of such persons—not to the conversion, as by magic, of volunteer trainees, training for their own benefit as students do in schools and colleges, into employees by legislative fiat, thereby making them employees instead of trainees, to their surprise as well as to the surprise of the public, by obliterating every traditional concept of employer and employee relationship.

The fact that provision for the *employment* of learners, apprentices and messengers was made in the same section which provided for the *employment* of "individuals whose earning capacity is impaired by age or physical or mental deficiency or injury" is further evidence (almost conclusive) that Congress made provisions for the *employment* of such persons at sub-

minimum wages and did not provide that volunteer trainees are *ipso facto* employees.

Judge Sibley, in *Walling* v. *Jacksonville Terminal Co.* (148 F. 2d 768) disposed of the Administrator's contention at page 770 thus:

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them, he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the section does not apply for no wages at all are due." (Emphasis by the Court.)

At the end of his opinion in *Walling* v. *The Nashville, Chattanooga & St. Louis Railway* (60 F. Supp. 1004), Judge Strum says:

> "Nor are these trainees 'learners' as contemplated by the Act. A 'learner' is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the 'learner', though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The Company gains no measurable benefit from their activities."

Legislative History of the Act.

At the outset, respondent respectfully asserts that the statement attributed to Senator Black on the floor of the Senate referred to by the Administrator in his petition (pp. 13-14) that the definition of employment contained in the Act is "the broadest definition that has ever been included in any one Act," is definitely *over-worked*. What Senator Black did say was as follows, and in a wholly different connection: The question before the Senate was whether producers and packers of fresh fruits and vegetables should be included or excluded from the operation of the Act. In response to a question from Senator Copeland, Senator Black said:

> "The committee after careful consideration reached the conclusion that the definition of *employment* as given in paragraph (7) of Section 2 and which is the broadest definition that has ever been included in any one Act, was sufficient to include every genuine *bona fide* farming activity." (81 Cong. Rec. 7657 [1937]).

There is nothing in Senator Black's statement to indicate that he, or other members of the Senate, thought the definition broad enough to abolish volunteer trainees and by mere definition convert *ipso facto* "trainees" into "employees" thereby obliterating every indicia of employer and employee relationship so commonly used and so well understood for so long in this country.

It is doubtful if any sponsor of the bill had in mind any such transition from the traditional concept of employer and employee relationship at the time the bill was debated (1937) or approved (June 25, 1938) at which times the problem in this country was unemployment—not employment. There were then too many employees for the jobs available. Employees were being laid off (R. 86, 311) and it is difficult to imagine that, in these circumstances, Congress was undertaking by some sort of tricky definition to wipe out the well recognized conception of the legal relation of employer and employee by general, obscure and ambiguous language in an Act drawn otherwise with precision, clarity and definitiveness.

Since Senator Black's statement concerning the definition of employment is pressed by the Administrator, the respondent calls attention to his opening statement on the floor of the Senate. In opening the discussion of the bill generally, Senator Black said (81 Cong. Rec. 7648):

> "The general purpose of the bill, legislatively speaking, is a three-fold one.
>
> "It provides a method of obtaining the objective of minimum wages and maximum work hours * * *
>
> "There is one provision of the bill which * * * would authorize action in connection with those businesses and industries that are seriously competing with and have a substantial effect upon the flow of interstate commerce.
>
> "The third objective of the bill is to prohibit the transportation in interstate commerce of goods which are produced by the work of children."

There is nothing in the Finding and Declaration of Policy Sec. 2(a), (b) of the Act to indicate an intention by Congress to convert a "trainee" into an "employee", regardless of the facts of the relationship. We do not think the court will impute such an absurdity to Congress, as to hold that by the language and definitions in the Act there was any intention on its part to attempt to make an employee out of the trainee whom neither the trainee nor any one else had ever considered to be an employee, and who had none of the attributes of an employee as every one but the Administrator had always understood the term.

The legislative history of the Act was considered by the District Judge in *Walling* v. *Jacksonville Terminal Co.*, (55 F. Supp. 302) wherein the court said at page 304:

> "There is nothing in the legislative history of the Fair Labor Standards Act to show congressional intent to cover the trainees under the Act. On the contrary, the legislative history shows that Congress intended a wage and hour law for the benefit of underpaid and overworked persons who are in fact employees, and did not intend the law to transform into employees persons who had never been and are not today such employees."

In the case (148 F. 2d 768) the Circuit Court of Appeals said at page 770:

> "The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice, *apparently satisfactory to all concerned.*"

In *Walling* v. *American Needlecrafts*, 139 F. 2d 60, this court said at page 64:

> "It is apparent from the debates that the purpose of the Congress was not to open the door to the return of the sweatshop system of unpleasant memory."

No "sweatshop system" is involved in the case now before the Court.

In *Walling* v. *Portland Terminal Co.*, Supra (155 F. 2d 215), the Court said at page 218:

> "There is no question but what this statute should be liberally construed for it is remedial and humanitarian legislation. Fleming v. Palmer, 1 Cir., 1941, 123 F. 2d 749, 762, certiorari denied 316 U.S. 662, 62 S. Ct. 942, 86 L. Ed. 1739. And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 1945, 323 U.S. 360, 362, 65 S. Ct. 295. But we do not believe that Congress intended to give to the term 'employee' the expansive scope that a literal construction of the words 'suffer or permit to work' would compel. We cannot infer that Congress intended the absurdities that such a construction would breed."

In *Jewell Ridge Corp.* v. *Local*, 325 U.S. 161, this Court pretty clearly stated that the Act deals with wages and hours only of persons actually *employed*. The Court repeated its language

from the Tennessee Coal case (321 U.S. 590, 602) as follows at page 167;

> "'The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an *employee's* time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by *employees* covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive *employees* of their statutory rights'." (Emphasis supplied.)

In the same case the dissenting opinion states at page 176:

> "'It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.' (Senate Report No. 884, 75th Cong. 1st Sess., pp. 3-4)."

Finally it is said in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, it is said at page 137:

> "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

It is respectfully submitted that the facts in the instant case clearly show that mere "trainees" are not "employees."

(1) The training is necessary that trainee may learn the duties of the job applied for and how to protect himself and others (R. 32-33, 50, 52, 80, 81, 152, 153-154, 155, 156, 237, 300, 301, 302, 322, 352).

(2) He trains for his own benefit and does nothing that a regular employee is not there to do and paid to do (R. 55-56, 58-59, 116, 119, 133, 134, 135, 137, 173, 209, 211, 215, 219, 220, 235, 238, 256, 281, 352).

(3) While training he is of no benefit to the Railway (R. 29, 33, 54-55, 56-57, 82, 94, 117, 118, 235, 281, 336, 337, 352).

(4) He comes and goes at will (R. 57, 58, 94-95, 114, 118, 129, 139, 143, 209, 221, 223, 272, 323, 336, 353, 355, 358).

(5) Whether he trains at all is optional with him. He is purely a volunteer (R. 50).

(6) He understands that he is not an employee while training (R. 28-29, 40, 48, 49-50, 79, 82, 118-119, 142-143, 219, 220, 235, 258, 276, 280, 312, 356, 359).

(7) The respondent has never considered the "trainee" as an "employee" (R. 82, 312).

(8) He is under no obligation to complete his training and become an employee (R. 39, 358, 312) and the Railway is under no obligation to employ him (R. 48, 50).

(9) He is given no seniority rights while a trainee (R. 50, 59, 82).

(10) Labor organizations treat him as a "trainee" and not as an "employee." They refer to his training as "pre-employment training period." He is not included in their contracts (R. 50, 85-86).

(11) The trainee has no duty or responsibility. That rests with the regular paid employee (R. 56, 82, 220, 301).

(12) He is not subject to any rules or discipline applicable to "employees" (R. 57, 83, 97, 301).

(13) The payment of five dollars a day to the "cubs" is not "wages." It is a gift of expense money and purely a voluntary payment made by respondent during the "pre-employment training period" (R. 42-43, 48-49, 75, 76, 78, 83, 297, 311, 320), as found by the learned trial judge (R. 369).

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for Writs of Certiorari should be denied.

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September, 1946.

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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PORTLAND TERMINAL COMPANY, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Leonard A. Pierce,
E. Spencer Miller,
Attorneys for Respondent

Of Counsel:
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 336

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

v.

PORTLAND TERMINAL COMPANY,
RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit is reported at 155 F. 2d 215. The opinion of the District Court is reported at 61 F. Supp. 345.

JURISDICTION

Action was originally brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of

the Fair Labor Standards Act (c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) in the United States District Court for the District of Maine to restrain respondent from alleged violations, forbidden by Sections 6, 11 and 15 of the Act. From final judgment of the aforesaid Court dismissing the cause petitioner appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the judgment of the District Court on April 29, 1946. Petition for certiorari has been filed with this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

STATEMENT OF THE CASE

By complaint filed in the District Court of the United States for the District of Maine, Southern Division, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, sought to have Portland Terminal Company, Defendant, enjoined from alleged violations of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act in so far as these sections relate to the payment of minimum wages to and the keeping of records in respect of persons called "trainees" who apply to the Portland Terminal Company for employment as yard brakemen and who are engaged in training in order that they may qualify for such positions. The questions presented to the District Court for decision were the narrow ones of whether "trainees" of Portland Terminal Company are employed by that company within the meaning of the Fair Labor Standards Act and whether such

trainees, even if held to be employees, are engaged in commerce or in the production of goods for commerce within the meaning of Section 6 (a) of the Act.

District Judge John A. Peters, before whom the case was tried, dismissed the complaint.

The Plaintiff, hereinafter referred to as the Petitioner, appealed to the United States Circuit Court of Appeals on the general ground that the trial judge erred in ruling that trainees for the jobs of brakemen at Defendant's railroad terminal were not employees of the Defendant, hereinafter called Respondent, within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs. The Circuit Court affirmed the judgment of the District Court, deciding as a matter of law that the trainees were not employees of Respondent within the scope of the Fair Labor Standards Act. Counsel for Respondent on briefs filed both in the District Court and the Circuit Court, contended not only that the trainees were not employees, but also that they were not engaged in commerce. This latter point, though not abandoned, has not been decided, the Circuit Court saying: "Because of the disposition we make of this case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce." 155 F. 2d 215, 216.

It is believed that there is no dispute as to the facts and that those of importance and pertinence are succinctly summarized by Judge Peters in his opinion, which is set forth in full at the end of this brief and designated APPENDIX A. On the mar-

gins opposite each finding appropriate notations referring to the record indicate the evidence upon which the finding or conclusion is based.

There follows a summary of facts pertinent to establishment of the nature of the relationship between the trainee and the Terminal Company. Each of the following statements is of a fact as found by the Trial Court below upon the evidence or as stated in evidence and in no wise modified or contradicted by other testimony.

SUMMARY OF FACTS

1. A period of training is necessary to qualify an inexperienced man for the job of yard brakeman. (R. 38, 39 Thomas; R. 87, 88, 89, 90 O'Neil; R. 108, 109 Dykeman; R. 123 Opinion).

2. Satisfactory training must consist both of observation and performance of acts under supervision. (R. 39 Thomas; R. 90 O'Neil; R. 110 Dykeman).

3. For many years prior to the enactment of the Fair Labor Standards Act, Portland Terminal Company and other railroads have engaged in the practice of teaching applicants for jobs. (R. 40 Thomas; R. 108, 109 Dykeman).

4. While being taught, applicants for jobs as yard brakemen are called "trainees." (R. 4 Complaint; R. 15 Amended Answer; R. 123 Opinion).

5. Such applicants have always understood that they would receive no pay while training. (R. 103, 104 Strout; R. 105, 106 Johnson; R. 124 Opinion; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

6. Trainees have never looked upon themselves as employees. (R. 109 Dykeman).

7. The Company does not consider trainees to be employees. (R. 41 Thomas; R. 125 Opinion).

8. Employees of the Company and the Union representing them do not look upon trainees as fellow-employees. (R. 112 Dykeman; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

9. Trainees have considered that they were being taught the duties of a yard brakeman in order that they might obtain such a position. (Plaintiff's Exhibit No. 3, R. 114, offered R. 27).

10. A trainee is instructed by the members of a full regular yard crew. (R. 33, 39 Thomas; R. 109, 110, 111 Dykeman).

11. No trainee ever takes the place of a regular member of a yard crew. (R. 39 Thomas; R. 109, 110, 111 Dykeman; R. 123 Opinion) and recollections of a trainee as to working without a full regular crew were demonstrated to be false. (R. 76 Widor; R. 99 Tracey).

12. All acts performed by a trainee are done in the immediate presence of and under the immediate supervision of a member of the regular yard crew. (R. 109, 110, 111 Dykeman).

13. A trainee is always an extra and unnecessary man. (R. 123 Opinion).

14. The trainee does not aid the work of a yard crew but rather impedes it and slows it down. (R. 109 Dykeman; R. 124 Opinion).

15. The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days. (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion).

16. The yard conductor determines when a trainee has qualified, and upon the conductor's certification the trainee's name automatically "goes on the board" among the names of other employees. (R. 30 Thomas; R. 102 Quincy; R. 124 Opinion).

17. Trainees are not subject to rules or discipline applicable to employees. (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

18. Trainees are expected to remain during a work day with the assigned crew but if they do not do so, they are not penalized, nor are their training privileges terminated. (R. 39, 40 Thomas).

19. Since October 1, 1943, by virtue of a supplemental agreement with the Union representing qualified employees, applicants who have completed their training and become employees are given an allowance of $4.00 a day for time spent training. (Plaintiff's Exhibit No. 7, R. 118, offered R. 33; R. 125 Opinion).

20. Trainees who do not complete training receive no allowance and applicants for training privileges are so notified at time of application. (R. 103 Strout; R. 105, 106 Johnson; R. 125 Opinion).

21. Neither the acts performed by trainees nor the hours spent by them on railroad property are

of any immediate advantage to the railroad. (R. 39 Thomas; R. 109 Dykeman; R. 123, 124 Opinion).

Upon consideration of all the facts, the District Judge concluded that no employment relationship exists between Portland Terminal Company and those persons being instructed by it and known as trainees. He, therefore, found that no wage obligation arose and that payment to qualified employees of an allowance for "time spent training or failure to make such an allowance was immaterial." These findings were premised upon the ground that the Act does not create new employment relationships or new wage liabilities but regulates such when they exist. Accordingly, the Court " . . . finding no violation of law and no reason to apprehend any . . . " (R. 126 Opinion) caused judgment to be entered dismissing the complaint.

The facts are again summarized succinctly, and comprehensively analyzed, together with the findings of the Trial Court, in the opinion of Mahoney, J., 155 F. 2d 215. The decisive point in that opinion is that the activities of the trainees are of primary benefit to them rather than to the railroad. The fact that they exert themselves or suffer a modified control is of no more significance than would be the presence of these elements in the case of an author who for his own benefit and to fit him to write a railroad novel, was allowed to do work on railroad premises.

ARGUMENT

A. Elements Necessary for Granting of Certiorari are Absent in This Case.

As stated in Rule 38.5 of the Revised Rules of this Court, " . . . review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." There appears to be no exception in favor of an officer or agency of the United States.

This Court is asked to issue a writ of certiorari in this case on the sole ground that the First Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this Court.

It is significant that the Administrator did not seek a writ of certiorari in the case of *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5th 1945), which involved a factual situation similar to that in the instant case, and in which the Court in an unanimous opinion determined that railroad "trainees" were not employees under the Fair Labor Standards Act.

In course of argument before the Circuit Court, counsel for the Administrator was asked by the Court, in substance, why the Administrator had not sought certiorari after the decision in the Jacksonville case, and reply was made to the effect that a split of decisions between the circuits was being sought in order to insure the granting of certiorari. In this aim, the Administrator has been disappointed. There is no lack of uniformity of decision. The question here at issue has been decided

against the Administrator by so many tribunals that denial of his petition will effectually settle this matter. There is less reason to grant certiorari in this case than in *Schroepfer* v. *Abell Company, Inc.*, 138 F. 2d 111, certiorari denied 321 U. S. 763, and again 322 U. S. 770.

Not only is there no conflict of decisions in various circuits with respect to the law involved in this case, but there is overwhelming as well as unanimous authority supporting contentions of the Respondent. The questions presented in the instant case have, in slightly differing factual situations, been passed upon by seven Federal Courts and the Administrator's contentions have been repudiated by all of them. The cases are:

Walling, Administrator v. *Jacksonville Terminal Co.* (1944) D. C. S. D. Fla., 55 F. Supp. 302;

Walling, Administrator v. *Jacksonville Terminal Co.* 5 Cir. 1945, 148 F. 2d 768;

Walling, Administrator v. *The Nashville, Chattanooga & St. Louis Railway* (1945) D. C. M. D. Tenn., 60 F. Supp. 1004;

Walling, Administrator v. *The Nashville, Chattanooga & St. Louis Railway*, 6 Cir. June 1, 1946, 155 F. 2d, 1016;

Walling, Administrator v. *Portland Terminal Co.* (1945) D. C. S. D. Maine, 61 F. Supp. 345;

Walling, Administrator v. Portland Terminal Co. 1 Cir. 1946, 155 F. 2d 215;

Walling, Administrator v. *Norfolk Southern Railway Company* (July 9, 1946) D. C. E. D. of No. Car., July 9, 1946, F. Supp.

The belief of the Administrator that a conflict of decisions in various circuits was necessary to in-

sure granting of certiorari was well founded as the instant case does not present questions of federal law which require decision by this Court.

The decision below does not make inoperative the congressional intent evidenced by the Fair Labor Standards Act to set aside sub-standard employment terms forced by employers on unorganized employees and does not restrict or impair Section 14 of the Act.

The Fair Labor Standards Act was enacted to guarantee certain minimum benefits to "employees." It was not passed to create an employee-employer relationship, where one never before existed. In the words of the Court in the Jacksonville case, "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law." The instant decision does not represent a refusal to apply such standards to a situation which was intended by Congress to fall within the provisions of the Act.

A decision which holds only that "trainees" who have never been "employees" were not made employees by the Fair Labor Standards Act does not go sufficiently to the heart of the Act and to the purposes intended to be accomplished thereby to create a federal question requiring a decision by this Court.

Section 14 of the Act by its very terms applies only to the employment of learners and apprentices. The tests of whether learners are employed are no different from tests applicable to other alleged employees. A person learning an occupation on the premises of a business may be its employee

or he may not. Before there is any occasion to consider the provisions of Section 14, it must first be determined through application of the indicated tests that the trainee is an employee. It cannot have been the intention of Congress to limit opportunities for studying industrial occupations to persons who are employees or to impose upon all such students an employee status.

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The Section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the Section does not apply for no wages at all are due." *Walling* v. *Jacksonville Terminal Co.* (1945) 148 F. 2d 768, 770.

While the legislative history of the Act may demonstrate that Congress determined " . . . to place the regulation of the *employment* of all beginners in the hands of the Administrator . . . "

(Petitioner's brief, page 17) it also demonstrates that Congress did not decide or desire to place the regulation of all beginners whether employed or not in the hands of the Administrator. Section 14 by its use of the term "the employment of learners" clearly indicated that the Administrator's task was limited to securing for employees, whether or not trainees, the standards fixed by law. The Administrator, not content to remain within the field marked out by Congress, now seeks to reach out to regulate not "the employment of learners" but all learners whether or not employed.

Petitioner argues exhaustively at pages 15, 16 and 17 of his brief that the legislative history of the Act reveals Congressional intent to cover the trainee. This point has been judicially determined adversely to the contention.

> "There is nothing in the legislative history of the Fair Labor Standards Act to show Congressional intent to cover the trainee under the Act. On the contrary, the legislative history shows that Congress intended a wage and hour law for the benefit of underpaid and overworked persons who are in fact employees, and did not intend the law to transform into employees persons who had never been and are not today such employees."
>
> *Walling* v. *Jacksonville Terminal Co.*, 55 F. Supp. 302, 304.

Since the Fair Labor Standards Act is remedial and humanitarian legislation, it may be proper to depart from consideration of strict legal principles and refer briefly to the position of the trainee.

The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion). Thereafter either the trainee becomes unquestionably an employee or leaves the carrier entirely. There can be no serious economic repercussions from the decision in this case. The actual cash payable, if the Administrator be correct, cannot be substantial to any individual trainee or to all.

The position of the "trainee" is summarized by the Court in *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 at 770:

> "The trainees are not child laborers nor economically oppressed persons nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice apparently satisfactory to all concerned."

It is apparent that neither a conflict of law nor public interest demand review of this case by this Court, and that the petition should be denied.

B. The Trainees in This Case Clearly are not Employees Within the Meaning of the Fair Labor Standards Act.

Upon analysis the whole legal controversy centers upon interpretation of Sec. 3 (g) reading "'Employ' includes to suffer or permit to work." It is the position of the Administrator that any person who does work which is suffered by and hence could be prevented by Portland Terminal Company is thereby its employee under the Fair Labor Standards Act. The position of Respondent, as of all Courts which have decided the precise question, is that the phrase "'Employ' includes to suffer or permit to work" must be read with common sense and with a view to the matters dealt with by the Statute; that Congress cannot have intended to render liable as an employer of another any person who suffers that other to do work which that other could be prevented from doing. "Manifestly this would encompass all employed humanity." *Walling* v. *Sanders, et al.* (1943) 6 Cir., 136 F. 2d 78, 81.

Argument of Respondent may be epitomized and concretely illustrated by the following. It seems obvious that a person may do work on its premises (1) for the immediate benefit of Portland Terminal Company; (2) for another master; (3) for his own exclusive pecuniary benefit; or (4) for his own benefit or pleasure contributing nothing of value to Portland Terminal Company. It is crystal clear that in the case of (1) the person is an employee of Portland Terminal Company under the Act; that in (2) he is the employee of a stranger and that he cannot look to Portland Ter-

minal Company for wages or the standard thereof; that in (3) he may be an independent contractor and as such is the servant or employee of no one; and that in (4) he may be, for instance, a photographer taking pictures for his own pleasure or benefit, a railroad enthusiast working as a volunteer for his own edification or pleasure, a prospective author, as suggested by Mahoney, J., or, as in the case at bar, a student studying an occupation for his own exclusive benefit.

Nothing could be clearer than that the person in each of the illustrations except (1) is not an employee of Portland Terminal Company under the Fair Labor Standards Act. It is evident that the broad interpretation sought by the Administrator is susceptible of exception in many more instances than in the sole case of a person who is the employee of a third party as suggested by Magruder, J., (see *Schroepfer* v. *Abell Co.*, 48 F. Supp. 88, holding persons, alleged by the plaintiff to be employees under the Fair Labor Standards Act, to be independent contractors) and there are many relationships including the one disclosed by the factual situation in the case at bar which render the Administrator's interpretation strained beyond the bounds of reasonableness. If it is asked why Congress chose to define so broadly the word "employ," the answer is ready. "In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of proving a contract of employment." *Walling* v. *Sanders et al.* (supra) p. 81.

The Court below has pointed out that "In *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 1945, 325 U. S. 161, 163-166, 65 S. Ct. 1063 and *Tennessee*

Coal, Iron & R. Co. v. *Muscoda Local No. 123*, 1944, 321 U. S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949, the Supreme Court set forth the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business." In this case the third element is wholly lacking. No significance can be attached to the probability that some of the trainees will eventually become regular employees and so indirectly benefit the railroad. Portland Terminal brakeman might secure their instruction on other premises and under other supervision, and even have to pay for it, as do stenographers and lawyers employed by a railroad and who have to be trained before becoming employees; and a Portland Terminal trainee may never become employed by that Company. Furthermore, the second element is present in a degree consistent with control exercised by a teacher over a student rather than by an employer over an employee. We have seen that trainees are not subject to rules or discipline applicable to employees (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

Some confusion is injected into this case by the citation of tort cases to uphold the contention that trainees of Respondent are employees for purposes of the Fair Labor Standards Act. Consideration of cases such as *Brown* v. *Chicago R. I. & P. Ry. Co.* (1926), 315 Mo. 409, 286 S. W. 45; and *Rief* v. *Great Northern Ry. Co.* (1914), 126 Minn. 430, 148 N. W. 309, referred to in his dissenting

opinion by Magruder, J. 155 F. 2d 215, 220, holding in each instance that a railroad trainee is an employee within the Federal Employers Liability Act, indicates conclusively that such decisions have no bearing on the case at bar. In the first place, it is obvious that mere nomenclature does not establish the applicability of the Fair Labor Standards Act. It is conceded and contended by Respondent that circumstances surrounding the relation between trainee and railroad might be such as to constitute a trainee an employee. For instance, if a trainee were hired by contract, performed service valuable to the railroad and for which the railroad was obligated to pay the trainee, there could be no doubt of employment within the Fair Labor Standards Act. It appears that in the cases cited above, the trainee was performing service and work valuable to the railroad. In the Brown case, the trainee fired the boiler, ran the stoker, shoveled coal and cleaned out the cinders.

In the Rief case at 126 Minn. 432, the Court found that the trainee:

> " . . . was expected to perform and did perform such tasks as were assigned to him by the members of the crew in charge of its trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of the train."

It is perfectly clear that trainees not performing service of value to the alleged employers are not employees even under the Federal Employers Liability Act. *Bourne* v. *Southern Ry. Co.* (No. Car. 1945) 33 S. E. 2d 239; *Chesapeake & Ohio*

Ry. v. *Harmon's Administrator* (1916), 173 Ky. 1; and see *Fineburg* v. *Public Service Ry. Co.* (1919), 94 N. J. Law R. 55, 108 Atl. 311; *Norfolk & W. Ry. Co.* v. *Bondurant's Admr.* (1907), 107 Va. 515, 59 S. E. 1091.

Tort cases such as *Huntzicker* v. *Illinois Cent. R. Co.* (1904), 129 F. 548, referred to by Allen, J., in the dissenting opinion in *Walling, Administrator* v. *Nashville, Chattanooga & St. Louis Railway*, 155 F. 2d 1016, decided June 1, 1946, holding that the particular trainee in each instance was an employee at common law, are even less in point than tort cases under statutes. Not only does it appear that the particular trainee was engaged in service of value to the company but it is further apparent that the fellow servant rule which is involved rests upon association between a servant and other servants of the same master rather than upon employment such that an obligation to pay wages arises. This fundamental principle is recognized by the Court in the Huntzicker case, which says, at Page 550:

> "Probably the service was not of much value but such as it was it necessarily brought him into association and coöperation with the other servants employed in moving the trains. The rule applicable to the relation of fellow servants rests upon the idea of such voluntary association and coöperation and the assumption of the risk arising therefrom."

and

> "There are cases which hold that it is not even necessary that one volunteering to assist the servants of their employer should have the expectation of reward, if he has no interest in having the thing done, in order to constitute

him a fellow servant. These cases go upon the ground that the party joined the servants and was doing what he did in the assumed relation of a servant and consequently took the risk of the negligence of his fellow servants."

Of course the answer to all tort cases, whether at common law or under statutes, is that indicia establishing such an employment relationship that liability of the master ensues either for torts committed by the alleged servant or to him by a fellow servant, may and often do, fail to establish employment in the sense that the alleged employer is obligated to pay wages. Supporting this contention are the words of the Court in *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d at 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid to employees. We repeat what we said in *Bowman* v. *Pace*, supra (119 F. 2d 861) that 'wages are due according to principles of contract, not of tort.'"

In this connection Judge Strum in *Walling* v. *The Nashville, Chattanooga & St. Louis Railway* (supra) said at page 1006:

> "For the purpose of this Act whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable."

In *Yellow Cab Co.* v. *Magruder*, 49 F. Supp. 605, at Page 607, the Court said:

> "Many decided cases on generally similar factual situations have very properly held a cab company such as the plaintiff in this case, to liability to the public, even when the real relationship between it and the drivers of its cabs is not that of employer and employee, or master and servant."

In *Bowman* v. *Pace Co.*, 119 F. 2d 858, 861, we find:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, citing especially 39 C. J. Master and Servant, p. 38; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co.* v. *Smeltzer*, 6 Cir., 88 F. 2d 94, 112 A. L. R. 74. These cases and those cited by C. J. relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed. §§665, 680."

The foregoing illustrates so clearly the correctness of the decision of the Circuit Court below and the illogical position of the Petitioner that it is submitted that review by the Supreme Court of the United States is not warranted.

CONCLUSION

Respondent submits that:

(1) It is apparent that elements justifying issue of a writ of certiorari are absent.

(2) Upon the facts as stated the decision of the Court below is obviously correct.

(3) Each of the two foregoing reasons is, in and of itself, sufficient cause for denial of the petition,

WHEREFORE, Respondent prays this Honorable Court that the petition for a writ of certiorari be denied.

Respectfully submitted,

LEONARD A. PIERCE,
E. SPENCER MILLER,
Attorneys for Respondent.

Of Counsel:

HUTCHINSON, PIERCE, CONNELL, ATWOOD AND SCRIBNER.

August 1946.

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MAINE
(SOUTHERN DIVISION)

L. METCALFE WALLING, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, PLAINTIFF

VS.

PORTLAND TERMINAL COMPANY, DEFENDANT

OPINION OF THE COURT

18TH JUNE, 1945

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a) (2) and 15 (a) (5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

Record References and Name of Witness supporting each Finding of Fact.

FINDINGS OF FACT

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners." If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad however, as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

R. 20, 24 Thomas

R. 38, 39 Thomas
R. 87-90 O'Neil
R. 108, 109 Dykeman

R. 39 Thomas
R. 64, 65 Morgan
R. 87, 88 O'Neil
R. 105 Johnson
R. 109 Dykeman

R. 33, 39 Thomas
R. 109, 110, 111 Dykeman

R. 107 Johnson
R. 30, 31 Thomas
R. 103 Strout
R. 105, 106 Johnson
Exhibit No. 5.
R. 116, Offered R. 29
Exhibit No. 7.
R. 118, Offered R. 32

R. 30 Thomas

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

R. 85 Haney
R. 103 Strout
R. 105, 106 Johnson

R. 39 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The length of the training period, if completed, depends upon the aptitude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

Exhibit No. 3, R. 114, Offered R. 27

R. 39, 42 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee.

R. 39, 40, 42 Thomas
R. 83-86 Haney
R. 112 Dykeman

While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such.

R. 30 Thomas
R. 106 Johnson

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business.

R. 30-33 Thomas

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows:

"Effective October 1, 1943, and for the duration of the present Emergency, Student Brakeman, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service. Exhibit No. 9, R. 118, Offered R. 33

"Payment to be made if and when Student has qualified, is accepted for and takes employment.

"If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point. R. 32 Thomas

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11 (c) covering the trainees.

CONCLUSION OF LAW

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of paying trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling* v. *Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in *Walling, Adm.* v. *Nashville, Chattanooga and St. Louis Ry.*, recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

V.

PORTLAND TERMINAL COMPANY,
RESPONDENT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 336

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

V.

PORTLAND TERMINAL COMPANY, RESPONDENT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit is reported at 155 F. 2d 215. The opinion of the District Court is reported at 61 F. Supp. 345.

JURISDICTION

Action was originally brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060); U. S. C. Title 29, Sec. 201 et seq.) in the United States District Court for The District of Maine to restrain respondent from alleged violations, forbidden by Section 6, 11 and 15 of the Act. From final judgment of the aforesaid Court dismissing the cause petitioner appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the judgment of the District Court on April 29, 1946. Petition

for certiorari was filed with this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347) which it granted October 14, 1946.

STATEMENT OF THE CASE

By complaint filed in the District Court of the United States for the District of Maine, Southern Division, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, sought to have Portland Terminal Company, Defendant, enjoined from alleged violations of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act in so far as these sections relate to the payment of minimum wages to and the keeping of records in respect of persons called "trainees" who apply to the Portland Terminal Company for employment as yard brakemen and who are engaged in training in order that they may qualify for such positions. The questions presented to the District Court for decision were the narrow ones of whether "trainees" of Portland Terminal Company are employed by that company within the meaning of the Fair Labor Standards Act and whether such trainees, even if held to be employees, are engaged in commerce or in the production of goods for commerce within the meaning of Section 6 (a) of the Act.

District Judge John A. Peters, before whom the case was tried, dismissed the complaint.

The Plaintiff, hereinafter referred to as the petitioner, appealed to the United States Circuit Court of Appeals on the general ground that the trial judge erred in ruling that trainees for the jobs of brakemen at Defendant's railroad terminal were not employees of the Defendant, hereinafter called respondent, within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs. The Circuit Court affirmed the judgment of

the District Court, deciding as a matter of law that the trainees were not employees of respondent within the scope of the Fair Labor Standards Act. Counsel for respondent on briefs filed both in the District Court and the Circuit Court, contended not only that the trainees were not employees, but also that they were not engaged in commerce. This latter point, though not abandoned, has not been decided, the Circuit Court saying: "Because of the disposition we make of this case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce." 155 F. 2d 215, 216 (R. 136 Opinion).

It is believed that there should be no substantial dispute as to the facts. Those of importance and pertinence are succinctly summarized by Judge Peters in his opinion, which is set forth in full at the end of this brief and designated APPENDIX A. On the margins opposite each finding appropriate notations referring to the record indicate the evidence upon which the finding or conclusion is based.

Petitioner has sought by consolidating this case with that of Walling v. The Nashville, Chattanooga & St. Louis Ry. in his petition for certiorari to treat the two cases as identical on the facts. He sets forth his version of the facts in the Nashville case at some length and then states (p. 11) that: "Among its (Portland Terminal) employees are yard brakemen who undergo a training period substantially like that given by respondent in the Chattanooga Case....." Since the facts are not identical in the two cases there follows a summary of facts pertinent to establishment of the nature of the relationship between the trainee and the Portland Terminal Company. Each of the following statements is of a fact as found by the trial Court below upon the evidence or as stated in evidence and in no wise refuted by other testimony.

SUMMARY OF FACTS

1. A period of training is necessary to qualify an inexperienced man for the job of yard brakeman. (R. 38, 39 Thomas; R. 87, 88, 89, 90 O'Neil; R. 108, 109 Dykeman; R. 123 Opinion).

2. Satisfactory training must consist both of observation and performance of acts under supervision. (R. 39 Thomas; R. 90 O'Neil; R. 110 Dykeman).

3. For many years prior to the enactment of the Fair Labor Standards Act, Portland Terminal Company and other railroads have engaged in the practice of teaching applicants for jobs. (R. 40 Thomas; R. 108, 109 Dykeman).

4. While being taught, applicants for jobs as yard brakemen are called "trainees." (R. 4 Complaint; R. 15 Amended Answer; R. 123 Opinion).

5. Such applicants have always understood that they would receive no pay while training. (R. 103, 104 Strout; R. 105, 106 Johnson; R. 124 Opinion; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

6. Trainees have never looked upon themselves as employees. (R. 109 Dykeman).

7. The Company does not consider trainees to be employees. (R. 41 Thomas; R. 125 Opinion).

8. Employees of the Company and the Union representing them do not look upon trainees as fellow-employees. (R. 112 Dykeman; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

9. Trainees have considered that they were being taught the duties of a yard brakeman in order that they might obtain such a position. (Plaintiff's Exhibit No. 3, R. 114, offered R. 27).

10. A trainee is instructed by the members of a full regular yard crew. (R. 33, 39 Thomas; R. 109, 110, 111 Dykeman).

11. No trainee ever takes the place of a regular member of a yard crew, (R. 39 Thomas; R. 109, 110, 111 Dykeman; R. 123 Opinion) and recollections of a trainee as to working without a full regular crew were demonstrated to be false. (R. 76 Widor; R. 99 Tracey).

12. All acts performed by a trainee are done in the immediate presence of and under the immediate supervision of a member of the regular yard crew. (R. 109, 110, 111 Dykeman).

13. A trainee is always an extra and unnecessary man. (R. 123 Opinion).

14. The trainee does not aid the work of a yard crew but rather impedes it and slows it down. (R. 109 Dykeman; R. 124 Opinion).

15. The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days. (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion).

16. The yard conductor determines when a trainee has qualified, and upon the conductor's certification the trainee's name automatically "goes on the board" among the names of other employees. (R. 30 Thomas; R. 102 Quincy; R. 124 Opinion).

17. Trainees are not subject to rules or discipline applicable to employees. (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

18. Trainees usually remain during a work day with the assigned crew but they are not required to do so and if they do not, they are not penalized, nor are their training privileges terminated. (R. 39, 40, 42 Thomas).

19. Since October 1, 1943, by virtue of a supplemental agreement with the Union representing qualified employees, applicants who have completed their training and become employees are given an allowance of $4.00 a day for time spent training. (Plaintiff's Exhibit No. 7, R. 118, offered R. 33; R. 125 Opinion).

20. Trainees who do not complete training receive no allowance and applicants for training privileges are so notified at time of application. (R. 103 Strout; R. 105, 106 Johnson; R. 125 Opinion).

21. Neither the acts performed by trainees nor the hours spent by them on railroad property are of any immediate advantage to the railroad; they are on the contrary a disadvantage. (R. 39, 42 Thomas; R. 109 Dykeman; R. 123, 124 Opinion).

Upon consideration of all the facts, the District Judge concluded that no employment relationship exists between Portland Terminal Company and those persons being instructed by it and known as trainees. He, therefore, found that no wage obligation arose and that payment to qualified employees of an allowance for "time spent training or failure to make such an allowance was immaterial." These findings were premised upon the ground that the Act does not create new employment relationships or new wage liabilities but regulates such when they exist. Accordingly, the Court ".... finding no violation of law and no reason to apprehend any...." (R. 126 Opinion) caused judgment to be entered dismissing the complaint.

The facts are comprehensively analyzed, together with the findings of the trial Court, in the opinion of Mahoney, J., 155 F. 2d 215 (R. 135-141 Opinion). The decisive point in that opinion is that the activities of the trainees are of primary benefit to them rather than to the railroad. The fact that they exert themselves or suffer a modified control is of no more significance than would be the presence of these elements in the case of an author who for his own benefit and to fit him to write a railroad novel, was allowed to do work on railroad premises. The object of the trainee is to learn an occupation and the object of the railroad is to teach him; it is not the object of the trainee to serve the railroad to the best of his

ability, nor of the railroad to secure the advantage of his service such as it is.

SUMMARY OF THE ARGUMENT

I. TRAINEES OF PORTLAND TERMINAL COMPANY ARE NOT EMPLOYEES WITHIN THE FAIR LABOR STANDARDS ACT.

A. Statutory Definitions of "Employer" and "Employee" are Intended to Describe a Relationship such that an Obligation to pay an Employee exists or is to be implied, and the Congressional History of the Act so indicates.

B. Consideration of the Facts in this Case in the Light of the Purposes of the Act compels a Conclusion that there is no Employment Relationship.

C. Railroad Trainees have been held not Employees under the Fair Labor Standards Act by Every Court which has Passed upon the Question.

II. DECISIONS IN TORT CASES, WHETHER UNDER EMPLOYERS LIABILITY ACTS, OR AT COMMON LAW, HOLDING THAT RAILROAD TRAINEES ARE EMPLOYEES, ARE INAPPLICABLE.

III. SECTION 14 OF THE FAIR LABOR STANDARDS ACT IS APPLICABLE ONLY IN EVENT THAT TRAINEES ARE EMPLOYED.

IV. THE FINDINGS OF THE DISTRICT COURT JUDGE WERE BASED UPON SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

V. TRAINEES OF THE PORTLAND TERMINAL COMPANY ARE NOT ENGAGED IN COMMERCE.

ARGUMENT

I. Trainees of Portland Terminal Company are not Employees within the Fair Labor Standards Act.

Determinative of this case is the answer to be given to the simple question of whether Portland Terminal Company "employs" persons on its premises while learning the duties of a yard brakeman in such a sense that it is compelled by the Fair Labor Standards Act to pay them wages and to keep records in respect of them according to the standards fixed by law. If employment in this situation exists, then the Administrator is clearly entitled to the relief sought. If it does not, the action of the District Judge in dismissing the complaint and refusing the injunction must be upheld. It is necessary to come to the question of whether trainees are engaged in commerce only if it is first concluded that they are employees. It is the purpose of this section of the brief to demonstrate that trainees involved in this action are not employees of the respondent.

A. Statutory Definitions of "Employer" and "Employee" are Intended to Describe a Relationship such that an Obligation to pay an Employee exists or is to be implied, and the Congressional History of the Act so Indicates.

Definitions provided by the Act follow:

Sec. 3 (d)—"'Employer' includes any person acting directly or indirectly in the interests of an employer in relation to an employee. . . ."

Sec. 3 (e)—"'Employee" includes any individual employed by an employer."

Sec. 3 (g)—"'Employ' includes to suffer or permit to work."

It is perfectly apparent that the terms have not been defined in the Act so as to create new or extraordinary concepts or even with sufficient precision to permit of formulation of a hard and fast single test sufficient to try and determine the existence of the employment relationship in many and varied practical business situations. Whether a particular person bears to another the relation of servant, servant of a third person, independent contractor, mere volunteer, licensee, or student, is a matter of judicial determination arrived at by analysis of all of the facts, consideration of their harmony with the conventional idea of what constitutes employment and tempered somewhat by a consideration of the nature of the statute and its purposes.

Since the Act is concerned with the amount of wages payable by employers to employees, it is to be constantly remembered that employment must mean a relationship from which some wage liability would naturally flow either as a result of specific contract or by implication. Thus "employment" for the purposes of interpretation of this Act may be broader or narrower than a common law concept or than a concept of employment arrived at in connection with statutes regulating labor relations, tort liability or child labor. We are here concerned with that kind of employment which carries with it the obligation to pay wages.

The case of *Bowman v. Pace Co.*, 119 F. 2d 858 (C. C. A. 5th, 1941) determined the question of whether a watchman furnished by the Forsythe Detective Agency to Pace Co. was an employee of the latter within the Fair Labor Standards Act. In the course of affirming the decision of the district judge holding that Bowman was not the defendant's employee, the Court said, at Page 860:

"It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage

liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act."

This case is authority for the propositions that the Fair Labor Standards Act is aimed at setting certain wage standards for persons who are bona fide employees of certain classes of employers and that the phrase "to suffer or permit to work" must be read as though the words "under such circumstances that an obligation to pay for the work exists or is to be implied" were added. Indeed, any broader construction would render business men liable for the standard of wages not only of their bona fide employees but also of independent contractors, employees of independent contractors, employees of strangers and mere volunteers; and it would render instructors liable to pay for the work of their pupils. Such would be some of the absurd conclusions logically flowing from upholding the Administrator's contention with respect to the meaning of Sec. 3 (g) of the Act.

It is the position of the Administrator that any person who does work which is suffered by and hence could be prevented by Portland Terminal Company is thereby its employee under the Fair Labor Standards Act. The position of respondent as of all Courts which have decided the precise question, is that the phrase "'Employ' includes to suffer or permit to work" must be read with common sense and with a view to the matters dealt with by the Statute; that Congress cannot have intended to render any owner of business premises liable for wages to all persons whom he suffers or permits to work, regardless of whether the work is of primary benefit to him or for the exclusive benefit of the workers or of third persons. "Manifestly this would encompass

all employed humanity." *Walling v. Sanders, et al.*, 136 F. 2d 78, 81 (C. C. A. 6th, 1943).

Argument of respondent may be epitomized and concretely illustrated by the following. It seems obvious that a person may do work on its premises (1) under the control of and for the immediate benefit of Portland Terminal Company; (2) for another master; (3) for his own exclusive pecuniary benefit; or (4) for his own benefit or pleasure contributing nothing of value to Portland Terminal Company. It is merely a development of the obvious to argue that in the case of (1) the person is an employee of Portland Terminal Company under the Act; that in (2) he is the employee of a stranger and that he cannot look to Portland Terminal Company for wages or the standard thereof; that in (3) he may be an independent contractor and as such is the servant or employee of no one; and that in (4) he may be, for instance, a photographer taking pictures for his own pleasure or benefit, a railroad enthusiast working as a volunteer, for his own edification or pleasure, a prospective author, as suggested by Mahoney, J., (R. 138 Opinion) or, as in the case at bar, a student studying an occupation for his own exclusive benefit.

Nothing could be clearer than that the person in each of the illustrations except (1) is not an employee of Portland Terminal Company under the Fair Labor Standards Act. It is evident that the broad interpretation sought by the Administrator is susceptible of exception in many more instances than in the sole case of a person who is the employee of a third party as suggested by Magruder, J., (see *Schroepfer v. Abell Co.*, 48 F. Supp. 88, holding persons alleged by the plaintiff to be employees under the Fair Labor Standards Act, to be independent contractors) and there are many relationships including the one disclosed by the factual situation

in the case at bar which render the Administrator's interpretation strained beyond the bounds of reasonableness. Such broad interpretation would result for instance in the inclusion within the purview of the Fair Labor Standards Act of persons such as Mr. Turner in the often followed and leading case of *Chicago R. I. & P. Ry. Co. v. Bond, Administrator*, 240 U. S. 449, 36 S. Ct. 403 (1916) who was held to be an independent contractor and as such not entitled to recovery under the Federal Employers Liability Act. If it is asked why Congress chose to define so broadly the word "employ," the answer is ready. "In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of proving a contract of employment." *Walling v. Sanders et al.* (supra) p. 81.

Decisions cited below by petitioner under state child labor or similar statutes, such as *Chattanooga Implement & Mfg. Co. v. Hartland*, 146 Tenn. 85, 239 S. W. 421 (1921), *Curtis & Gartside Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913), *People ex. rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474, (1918), *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912), *Commonwealth v. Hong*, 261 Mass. 226, 158 N. E. 759 (1927), and *Graham v. Goodwin*, 170 Miss. 896, 156 So. 513 (1934), are wholly inapplicable. These cases hold that statutes defining "employ" so as to include "suffer or permit to work" prohibit work of a minor in the plant, on the premises or in the business of an employer whether there is employment or not. The reason is, of course, that the aim of the statute in each of these cases is to forbid certain acts and occupations to minors whereas we are concerned with a statute not prohibiting performance of acts on industrial premises but setting standards of pay for persons employed. The following excerpt from Page 38 of the Curtis & Gartside Co. case (supra) fully illustrates the distinction:

> "The interdiction is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. The manifest *purpose of the law is to positively prevent children of this age from doing work of this character* and each of the terms "employed," "permitted" and "suffered" is given a distinct office in the general plan of prohibition." (Emphasis added).

The irrelevance of such citations is fully illuminated by consideration of the Graham case in which the owner of a stave mill was alleged to have infringed the Mississippi Child Labor Act by virtue of the presence on his premises of a minor who was employed by a seller of billets and which minor was injured while delivering billets at the mill. The court found that the mill owner did not employ the minor but suffered him to do work on his premises. Such cases obviously do not hold that suffering or permitting to work is tantamount to employment entailing wage liability.

The case of *Schroepfer v. Abell Co.* 48 F. Supp. 88 (D. Md. 1942) affirmed 138 F. 2d 111 (C. C. A. 4th 1943) involved the question of whether rackmen who sold newspapers through vending machines for which they paid a rental to the newspaper company and which credited them with receipts turned in less the cost of the papers and plus a weekly allowance of $25 for use of car, were employees under the Act and it was held by Chesnut, J. that such rackmen were independent contractors and not employees. At Page 94, the opinion reads:

> "The statutory definitions of 'employer,' 'employee,' and 'employ' are in very general terms, and should be understood 'in their natural sense, and intended to describe the conventional relation of employer and employee.' *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84..... The definition is too general to expressly solve the particular problem. We must therefore look to the provisions of

> the act as a whole to determine whether such a relationship as existed between the parties to this case constituted the Schroepfers employees of the defendant and thus entitled to the benefits of the Act."

and later, on the same page:

> "The Act thus contemplates (a) a stituation in which the employer, expressly or impliedly, agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee, because by 29 U. S. C. A. 211 (c) it is further provided that the employer must keep written records of the number of hours of work by the employees respectively."

This case is authority for the proposition that some sort of an employment relationship must be entered before liability to pay the standard of wages imposed by the Act can exist. There need be no express or formal contract but the facts must not negative the existence of wage liability. It is interesting to compare the Schroepfer Case (supra) with *National Labor Relations Board v. Hearst*, 322 U. S. 111, 64 S. Ct. 851 (1944), in which case the Supreme Court held that newsboys were employees of a newspaper within the meaning of the Wagner Act. It is evident first that each case must be carefully analyzed on its own facts to support a legal conclusion as to whether a particular person stands in relation to another as independent contractor or employee, and second, that weight will be given to the purposes of the particular act and the subject regulated. Illustrative of this is the following language used by the Court at Page 124 in the Hearst case:

> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation."

and

"Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical relation of 'master and servant' as the common law had worked this out in all its variations and at the same time a narrower one than the entire area of rendering service to others."

Newsboys other than temporary, casual or part time newsboys were found to be an integral part of the publisher's distribution system; they thought of themselves as employees and the newspaper company so regarded them; they worked for the newspaper company and performed services of value to it and their work was supervised by the publisher or its agents. Unquestionably their close economic relationship to the publisher, the permanence of the arrangement and the necessity of bargaining collectively with it, were factors which led the Court to find that they were employees under the Wagner Act. However, the case is readily distinguishable from the Schroepfer Case on many counts but partly because the subject with which the Fair Labor Standards Act is concerned is not collective bargaining but an employment relationship such that wage liabilities arise.

Comparison of these two cases illustrates not only the weight given to the subject regulated by the particular statute but the importance of thorough analysis of facts in each case and the almost controlling weight to be given to the findings of the trial judge or board in the first instance.

Further authority for the propositions that employment within the meaning of the Fair Labor Standards

Act is premised upon a contract express or implied under which wages become due and that "suffer or permit to work" has reference only to work under circumstances involving wage liability is found in the case of *Helena Glendale Ferry Co. v. Walling, Administrator*, 132 F. 2d 616 (C. C. A. 8th 1942). In that case a man named Johnson owned most of the stock in the ferry company and also a plantation upon which he employed a foreman. In addition to his plantation duties, the foreman under Johnson's orders hauled coal and built road approaches for the ferry company. He was paid only by Johnson. Upon these facts the foreman was found to be Johnson's employee and to be not employed by the ferry company within the meaning of the Fair Labor Standards Act even though in a sense it suffered the foreman to do work for it. At Page 620 the Court said:

> "The Act defines an employee as 'any individual employed by an employer' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted can not be interpreted to include as an employee one over whose hours of labor the employer has no control, *and to whom the employer is under no obligation to pay wages.*" (Emphasis supplied).

In some respects, even stronger authority for the views herein expressed than the case of Bowman v. Pace Co. (supra) is that of *Walling v. Sanders et al.*, 136 F. 2d 78 (C. C. A. 6th 1943), which involved the question of whether helpers of salesmen employed by a beer distributing concern and which helpers were hired and fired by the salesmen and paid by them were employees of the distributing company. The Court affirmed the finding of the trial judge (48 F. Supp. 9) that the helpers were without the Act, not because they were not engaged in

commerce but rather because they were not the company's employees; and with reference to the Administrator's contention that "suffer or permit to work" created unusually broad employment relationships, the Court said, at Page 81:

> "Since the appellee suffers or permits drivers to work for its salesmen, ipso facto they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The Administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anyone else. Manifestly this would encompass all employed humanity."

It, of course, can be argued as does Magruder, J. (R. 141 Opinion) that the Bowman, Sanders and Glendale Ferry cases "...:are not controlling, for there the men involved were admittedly employees and the only question was who was their employer?" but that approach is not quite realistic — the real question was whether the defendant was their employer and the tests applied to determine employment by the defendant are concerned with his obligation to pay wages. The language quoted goes far beyond a mere finding of fact that some other person was the true employer. Furthermore the Schroepfer case makes it clear that ability to point to a person other than defendant as employer is not determinative; the principle is applied to rackmen who are found to be employed by no one.

We have already intimated the danger of citing as authorities for the existence or absence of the employment relationship decisions under the common law and under other statutes. It may be in point, however, to cite *Yellow Cab Co. of D. C. v. Magruder, Collector of Internal Revenue*, 49 F. Supp. 605 (D. Md. 1943), involving decision of whether the Cab Company must

pay the federal insurance contribution tax which in turn depends upon determination of whether the drivers of its cabs are employees. The Act which is interpreted is the Social Security Act and the case is relevant here because the tax in question was due only if there was such an employment relationship as to give rise to a liability to pay wages. The Court found that the drivers leased their cabs, that the only monetary consideration passing between the parties was money paid by drivers for rentals of the cabs and, hence, that the relationship was not that of employment but of leasing and hiring and at Page 610, the opinion reads:

> "Counsel for the defendant also seeks to analogize this matter of wages in this case to the Red Cap cases arising under the Fair Labor Standards Act. *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Southern Railway Co. v. Black*, 4 Cir., 127 F. 2d 280; but there is no true analogy here. The tips received by the Red Cap porters in the railway stations were received as a result of their employment by the railroads for a necessary transportation service. The real question was whether the Fair Labor Standards Act was applicable to the situation. The Courts held that it was because the relationship between the parties and the railroads was really that of employment."

Incidentally, these Red Cap cases serve to emphasize the necessity of a more definite connection between the alleged employer and his alleged employee than mere permission to do work. All of the indicia point to employment of the Red Caps by railroads since the railroad often appoints head Red Caps, supervises their hours, dress, etc., instructs them as to meeting sick or disabled passengers, provides equipment for that purpose, and requires them to be stationed about a terminal at particular times and places. Furthermore, and of extreme importance, is the fact that contracts, often express and sometimes

implied, exist between the railroads and Red Caps. It even appears from the words of Mr. Justice Reed at Page 398, of the Williams case, that existence of a contract of employment is essential to that kind of employment from which wage obligations arise and hence are regulated by the Act. These words are:

> "If the redcap did not accept the terms offered, he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage. Restatement, Contracts Sec. 55. No such gift of services to the terminal is here claimed."

This interpretation is wholly consistent with the tenor of discussion July 30, 1937, in the Senate, over coverage of the Fair Labor Standards Act, among Senators Black, Copeland, and George (81 Cong. Rec. 7891). Certainly none of those Senators at that time appeared to be under the impression that suffering a redcap to work on railroad premises, and no more, would create, in and of itself, an employment status under the Act.

It is submitted that the foregoing reasoning and authorities conclusively show that the railroad trainee is not within the scope of the Fair Labor Standards Act unless he is an employee because the railroad has contracted to pay wages to him or because an obligation to pay wages is to be implied from the relationship of the parties and from the performance of service of value ordered by the railroad.

B. Consideration of the Facts in this Case in the Light of the Purposes of the Act compels a Conclusion that there is no Employment Relationship.

To determine existence or absence of an employment relationship for the purposes of this case, it is necessary to consider whether:

(1) There is a contract of employment which is express or implied.

(2) Trainees perform work or services of value to the railroad.

(3) Control and discipline are exercised by the railroad in like manner as in respect of admitted employees.

Judge Peters found (R. 124 Opinion) that applicants for training privileges are informed before entering upon the training period that they will receive an allowance for time spent training only if their course of training is completed and they "stay and go to work." The applicant signs a form reading "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, *employment to be subject* of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer." (Emphasis supplied). The trial judge also found that the learners are not required to serve the whole two weeks if they can qualify sooner and that aptitude of the individual determines the length of the training period (R. 124 Opinion). From the foregoing, two conclusions are inescapable; the first is that there is no express contract of employment during the training period, and the second is that the agreement completely negatives any kind of employment relationship. The parties have entered into an arrangement inconsistent with a contract of employment express or implied.

It remains to consider whether the attitude of the parties to each other is compatible with an employment relationship. It is clear from the record in this case (as well as from other cases to be cited under I-C) that the custom of training yard brakemen is of long standing both with Portland Terminal Company and

other railroads (R. 40 Thomas) and that neither the trainees while training (R. 109, 110, Dykeman; R. 85, Haney) nor the Terminal Company and its supervisory officers (R. 40, 41, Thomas) ever have considered trainees as employees. Furthermore, the agreement between the railroad and the Brotherhood of Railroad Trainmen (Plaintiff's Exhibit No. 7, Offered R. 33) and set out by the trial judge in his opinion (R. 125) clearly indicates that the Union representing the employees of Portland Terminal Company and bargaining for them, considered that a student brakeman is not an employee and that he becomes such only "... *if and when the student has qualified, is accepted for and takes employment.*" Closely allied to the question of whether employment exists by implication in absence of an express contract of employment and even in face of a contract and attitude impliedly denying employment, is the subject of whether service or work is performed to the benefit of the railroad. The trial Court found (R. 123 Opinion) that "If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of *no immediate advantage* to the railroad, however, as the trainee does not displace any member of the regular crew at the time. Rather it is a *disadvantage*, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be *impeded* rather than expedited." (Emphasis supplied). Therefore, it is conclusive that there is nothing of value in the service or work, if indeed it can be called such at all, of a trainee which would of itself imply an obligation of compensation. This is one of the important points on which other opinions such as those in the Red Cap cases (supra), *Walling v. American Needlecrafts, Inc.* (infra) and *Walling v. Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.,

1945) base a finding of employment, and upon which they can be strongly distinguished from the case at bar. The Court below has pointed out that "*In Jewel Ridge Coal Corp. v. Local No.* 6167, 325 U. S. 161, 163-166, 65 S. Ct. 1063 (1945) and *Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No.* 123, 321 U. S. 590, 598, 64 S. Ct. 698 (1944) the Supreme Court set forth the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business." (Of course it is recognized that, as stated by Mr. Justice Jackson (*Armour & Co. v. Wantock*, 323 U. S. at 132-133), these are not the criteria for all cases and that petitioner *might* have actually hired the trainees even though they were to do nothing; still, the absence of some of the mentioned criteria is significant here where employment is denied altogether and any attempt to prove it must be based upon the implications to be drawn from the relationship of the parties). In this case the third element is wholly lacking. No significance can be attached to the probability that some of the trainees will eventually become regular employees and so indirectly benefit the railroad. Portland Terminal brakemen might secure their instruction on other premises and under other supervision, and even have to pay for it, as do stenographers and lawyers employed by a railroad and who have to be trained before becoming employees, or Portland Terminal Company might organize a formal school with instructors paid to teach learners in a special test yard, not used by the Company in its business, in which case tuition might be exacted of and paid by trainees. A Portland Terminal trainee may never become employed by that Company and in fact five (R. 55, Carle, R. 71, Carter, R. 77, Widor, R. 81 Clark, and R. 83, Haney) of the fourteen witnesses called who had trained for positions as yard

brakemen never qualified and never became employed. Magruder, J., in his dissenting opinion, thinks that "It is of no consequence that during their early training period the trainees may be of little immediate benefit—indeed may be a 'disadvantage'—to the Company." He then says that loom operators may at first be an economic liability to the employer but that nevertheless they are employees. Thus comparison is made between the economic disadvantage of textile workers who are admitted to be employees, and whom the textile mill has agreed to pay, and these railroad trainees who are denied to be employees. In the latter situation the furnishing of service of value or the lack of such is an important indication of whether an obligation to pay wages is to be implied; in the textile mill example, since the loom worker is an admitted employee, receiving wages, indicia such as service of value are without significance.

Furthermore, the second element is present in a degree inconsistent with control exercised by an employer over an employee. The trial judge found that "While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such. (R. 124, 125 Opinion). This is illustrated by testimony of respondent's superintendent, Mr. Thomas, to the effect that failure of a trainee to report invokes no discipline and he is not forbidden to continue his studies, neither is he reprimanded for errors or omissions (R. 39, 40 Thomas; R. 112 Dykeman). It is apparent that the control and discipline are not those exercised by a master over his servant and are even more mild than the usual degree exercised by a school over its pupils. It is conceded that student brakemen usually remain with the assigned crew during the training period but this is not required nor is it required that a trainee assigned to a crew remain

during the full eight hour shift (R. 42 Thomas). This is entirely consistent with the trainee's status as a student. Since any man must acquire the necessary experience, knowledge and knack of doing things in order to qualify in the eyes of his instructor, it is to *the trainee's advantage* to attend regularly and attentively; otherwise, his training must necessarily take longer. Regular and prompt attendance is customarily expected by schools of their students and for the benefit of the latter. It is necessarily true that a trainee will learn more quickly and be ready for employment earlier if he is present during the yard crew's entire working day. In *Skidmore v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161 (1944) the question was whether fire fighters employed by a packing company were employees during a certain period while they were on the property of the employer and on call in the event of fire but otherwise free from duty. The Court said, at Page 163:

> "This involves scrutiny and construction of the agreements between the particular parties, approval of their construction of the working agreement by conduct, consideration of the nature of the service and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged..... The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

Applying these criteria there can be no doubt of the correctness of the conclusions of the trial Court. The agreements were clearly to the effect that a trainee is not an employee and that as a trainee he will not be paid. It is difficult to conceive of a state of facts which could more clearly indicate that a trainee is only a student who has been hired neither as a "learner" nor as a regular employee. It would certainly be stretching the statute to an absurd degree to hold that a trainee who thinks

he is a student and not an employee and entered his training with such understanding is nevertheless employed by a company which has for years treated such men as students and not employees, which has informed the applicant for training privileges of his status as a student, and whose superintendent, conductors and brakemen as well as the powerful Brotherhood representing them, have always believed that trainees were not employees and hence not subject to rules, regulations or discipline applicable to such a class.

Petitioner can derive no comfort from *Walling, Administrator* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943) or *Fleming, Administrator v. Palmer*, 123 F. 2d 749 (C. C. A. 1st, 1941), for they are clearly distinguishable from this case on at least three vital counts. In the first place, the Act has as a prime purpose the elimination of the sweat shop from American industry. Secondly, work was done for the employer on its order and by its direction, which work was valuable to the employer who had an obligation to pay for it. Thirdly, and of utmost persuasion in indicating a purpose to cover home workers, is Sec. 6 (a) (5) of the Act reading: " if such employee is a home worker in Puerto Rico....." None of these elements is present in this case.

Cases such as Fleming v. Palmer (supra), Cotton v. Ottenheimer, 3 Labor Cases, Par. 60326 (1941), and Walling v. Woodbine Coal Co. (supra), cited by petitioner, are further distinguishable from the case at bar on the ground that the courts found that the arrangement in each of those cases was one aimed at *evasion* of the Fair Labor Standards Act whereas we have seen that the practice of teaching railroad trainees antedates by many years the statute. There is no question of Portland Terminal Company's good faith.

C. Railroad Trainees have been held not Employees under the Fair Labor Standards Act by Every Court which has Passed upon the Question.

From a legal standpoint, the most persuasive reasons for sustaining the decision of the District Court are found in the precedents unanimously in harmony therewith. The questions presented by the instant case, in somewhat varying factual situations, have now been passed upon by seven federal Courts sitting in four different Circuits and the Administrator's contentions have been repudiated by all of them, despite the fact that the Administrator had the advantage of being able to choose his case and the tribunal before whom, in the first instance, it was to be tried. The cases are:

Walling, Administrator v. Jacksonville Terminal Co., 55 F. Supp. 302 (S. D. Fla., 1944);

Walling, Administrator v. Jacksonville Terminal Co., 148 F. 2d 768 (C. C. A. 5th, 1945);

Walling, Administrator v. The Nashville, Chattanooga & St. Louis Railway, 60 F. Supp. 1004 (M. D. Tenn. 1945);

Walling, Administrator v. The Nashville, Chattanooga & St. Louis Railway, 155 F. 2d 1016 (C. C. A. 6th, June 1, 1946);

Walling, Administrator v. Norfolk Southern Railway Company,—F. Supp.—(E. D. No. Car., July 9, 1946);

Walling, Administrator v. Portland Terminal Co., 61 F. Supp. 345 (S. D. Me. 1945);

Walling, Administrator v. Portland Terminal Co., 155 F. 2d 215 (C. C. A. 1st, 1946);

The point was first determined by Judge DeVane in *Walling, Administrator v. Jacksonville Terminal Co.*, 55 F. Supp. 302 (S. D. Fla. 1944), who said, at Page 304:

> "The trainee is not an employee under the commonly accepted meaning of the term, and despite

the language ' suffer or permit to work ' in the Act, 29 U. S. C. A. Sec. 203 (g) he is not an employee thereunder. Congress referred to employment in the Act as the word is commonly used as meaning physical or mental exertion controlled or required by the employer and pursued necessarily or primarily for the employer and his business. The trainee here comes under the head of a student rather than an employee."

The Administrator appealed from the decision of Judge DeVane to the Court of Appeals, Fifth Circuit, and decision of the three judges of that tribunal, Sibley, J. writing the opinion, was handed down April 23, 1945, and is reported 148 F. 2d 768. Commencing at the bottom of Page 769, the opinion reads:

" The Act, Sect. 3 (e) (g), defines ' employee ' as any individual employed by an employer; and ' employ ' as including ' to suffer or permit to work.' The last quoted words do not m an that every one who permits someone to work for a third person *or the worker's own self becomes an employer bound to pay statutory wages.* They mean that one is an employer if he permits another to work *for him*, though he has not expressly hired or employed him. The mere fact that he could have prevented the service does not make him in all cases an employer. A purely voluntary service for which no one intends there shall be pay, is not employment, but a gift. To permit another to work in my shop in making or repairing something for himself, would not make him my employee. The words ' suffer or permit to work ' must be understood with common sense. In the present case the Company did suffer the trainee to work on its premises and with its appliances, *but the benefit immediately in view was to the trainee*, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw switches or transmit signals, it was for his instruction. *The Company was*

not benefited, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee. And the parties had formally agreed that what was done was not for the Company, but for the trainee's benefit, and that no pay was expected. The agreement was made in good faith and represented the truth of the relationship. The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by substandard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice, apparently satisfactory to all concerned." (Emphasis supplied).

Certiorari was not sought as a result of the Jacksonville case but three other actions have been undertaken by the Administrator in three other circuits. It is apparent that the Administrator is contending that (1) the Jacksonville decision is wrong; and (2) the other cases justify another result because of differing facts. It is submitted by respondent that (1) the Jacksonville decision is right in law; and (2) that there is no substantial difference between the Jacksonville case and the Portland Terminal case on the facts.

It is not necessary in this part of the brief to devote time to consideration of the opinions below in this case and the Nashville case but it is enlightening to consider the Norfolk Southern Railway Company case, since it is the most recent decision in point. There the Court set forth at length his findings of fact in relation to the arrangement between the railroad and its trainees and then reached a conclusion based thereon, that persons permitted by the Norfolk Southern Railway " . . . . to

enter on its property and on its trains for the purpose of learning to become either firemen or trainmen were not suffered or permitted to work, and were not employees of the defendant, within the meaning of the 'Fair Labor Standards Act';. . . ." This decision is all the more persuasive since it is not based upon citation of the opinions in the other circuits and since the Court had the benefit of not only the majority views of the Circuit Courts in this case (decided April 29, 1946) and the Nashville case (decided June 1, 1946) but also the dissenting opinions of Magruder, J. and Allen, J. Judge Gilliam, like judges in the other circuits, seems to have been impressed with the fact that litigation was not instigated by labor or its organization and that the parties were satisfied with the arrangement for he says: "No complaint of the acts and omissions of the defendant concerning the matters involved in this controversy was made in any quarter prior to the filing of complaint in this case and no complaint has come from any other quarter since such filing."

II. Decisions in Tort Cases, Whether Under Employers Liability Acts, or at Common Law Holding that Railroad Trainees are Employees, are Inapplicable.

Consideration of cases such as *Brown v. Chicago R. I. & P. Ry. Co.*, 315 Mo. 409, 286 S. W. 45 (1926), *Findley v. Coal, etc. R. Co.*, 76 W. Va. 747, 87 S. E. 198 (1915), and *Rief v. Great Northern Ry. Co.*, 126 Minn. 430, 148 N. W. 309 (1914), holding in each instance that the particular railroad trainee is an employee within the Federal Employers Liability Act, and *Atchison, T. & S. F. Ry. Co., v. Fronk*, 74 Kansas 519, 87 Pac. 698 (1906), holding that a railroad trainee is an employee and so entitled to recover under a Kansas statute, indicates conclusively that such decisions have no bearing on the case at bar. In the first place, it is obvious that mere nomenclature does not establish the applicability of

the Fair Labor Standards Act. It is conceded and contended by respondent that circumstances surrounding the relation between trainee and railroad might be such as to constitute a trainee an employee. For instance, if a trainee were hired by contract, performed service valuable to the railroad and for which the railroad was obligated to pay the trainee, there could be no doubt of employment within the Fair Labor Standards Act. It may well be that trainees on one railroad are employed within the meaning of the Act, whereas trainees on another are not. The findings of fact by the trial Court are largely determinative of that.

Secondly, it appears that in every one of the cases cited above under II, the trainee was performing service and work valuable to the railroad. In the Brown case, the student fireman was serving in the cab of a freight train locomotive with the engineer and regular fireman. Whether, as assumed by Magruder, J., (R. 141 Opinion) he was serving as an extra man with a full crew is not certain since it may be that in the case of that railroad, as with those whose operations are familiar to counsel for respondent, a full crew in the locomotive cab of a tonnage freight train consists of three men, two of whom have the duty of shoveling coal, etc.; however, the important point is not whether Brown was an extra man but whether he was present merely to learn or also to perform service of value to the railroad and whether he contributed something in addition to that contributed by the regular fireman. It appears that he did, 315 Mo. at 414:

> "... on the interstate trip in question, deceased helped to fire the engine, ran the stoker, shoveled coal, and helped shake the grates and clean the cinders out of the pan, all under the orders of engineer Kidd and fireman Breitenbucher."

That performance of valuable service by the student fireman is a controlling element in the Brown case is

emphasized by the Court's citation of *Baltimore & Ohio Southwestern Railroad Company v. Burtch, Administratrix*, 263 U. S. 540, 44 S. Ct. 165 (1924). In that case a freight train conductor enlisted the help of a bystander in unloading a very heavy ensilage cutter which the regular crew could not handle without assistance. The Court said, at page 543: "The testimony shows that Burtch was not regularly employed, but that he engaged in this particular work at the request of the train conductor because it was necessary to unload the cutter and the train crew was unable to do so without help." It was the valuable service sought by and performed for the railroad that brought Burtch within the scope of the Federal Employers Liability Act.

In the Findley case, the Court said, at 76 W. Va. 755:

> "The designation of his rank as a student fireman does not imply lack of active duty for the company or service merely for himself as a student. The terms clearly imply practice in the form of *service to his employer* as well as study by observation. His *employment*, his place on the *payroll* of the company implies service"; (Emphasis supplied).

In the Rief case at 126 Minn. 432, the Court found that the trainee:

> ". . . . was expected to perform and did perform such tasks as were assigned to him by the members of the crew in charge of its trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of the train."

and in the Fronk case the Court found that the service actually performed was of value to the employer and even went so far as to say (74 Kansas at p. 523): "*The compensation of the Company for the privileges granted to Tindall was the work to be performed by him as freight brakeman.*" It is perfectly clear that men learning how to perform the functions of a certain job on the property of a railroad but at the same time performing

service of no value to the alleged employer are not employees even under the Federal Employers Liability Act. *Bourne v. Southern Ry. Co.*, 225 N. C. 43, 33 S. E. 2d 239 (1945); and see *Fineburg v. Public Service Ry. Co.*, 94 N. J. Law R. 55, 108 Atl. 311 (1919).

Tort cases such as *Huntzicker v. Illinois Cent. R. Co.*, 129 F. 548 (C. C. A. 6th, 1904) thought by Allen, J., to be contravened by the majority opinion in the Nashville case; *Millsaps v. Louisville, New Orleans & Texas Ry. Co.*, 69 Miss. 423, 13 So. 696 (1891), and *Lasser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 Pac. 439 (1906) holding that the particular trainee in each instance was an employee at common law, are even less in point than tort cases under statutes. Not only does it appear that the particular trainee was engaged in service of value to the company but it is further apparent that the fellow servant rule which is involved in each of these cases rests upon association between a servant and other servants of the same master rather than upon employment such that an obligation to pay wages arises. This fundamental principle is recognized by the Court in the Huntzicker case, which says, at Page 550:

> "Probably the service was not of much value but such as it was it necessarily brought him into association and co-operation with the other servants employed in moving the trains. The rule applicable to the relation of fellow servants rests upon the idea of such voluntary association and co-operation and the assumption of the risk arising therefrom."

and

> "There are cases which hold that it is not even necessary that one volunteering to assist the servants of their employer should have the expectation of reward, if he has no interest in having the thing done, in order to constitute him a fellow servant. These cases go upon the ground that the party joined the servants and was doing what he did in the assumed relation of a servant and consequently took the risk of the negligence of his fellow servants."

The decision in the Millsaps case rests on the English case of *Degg v. Midland Ry. Co.*, 1 Hurls & Norm. (Ex.) 773, holding that a mere bystander who volunteered to assist the Company's servants in moving a turntable and was injured by their negligence cannot recover under the fellow servant rule and upon *Barstow v. Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255 (1887), which holds that a mere volunteer, in no sense an employee of the railroad, learning telegraphy, if injured, while voluntarily running an errand, by negligence of the railway's servants, is barred from recovery. Nothing could more forcibly indicate the inapplicability of such cases.

Of course the answer to all tort cases, whether at common law or under statutes, is that tests establishing such an employment relationship that liability of the master ensues either for torts committed by the alleged servant or to him, or establishing such a relationship that the fellow servant rule bars recovery from the master, may and often do, fail to establish employment in the sense that the alleged employer is obligated to pay wages. Reading the opinion in the Brown case and the authorities cited on pages 415, 416 and 417 leaves no doubt that the Court was considering "employment" from the standpoint of tort and not wage liability, emphasizing, as National Labor Relations Board v. Hearst Publications (supra) emphasizes, that "employment" must be read with the subject matter regulated uppermost in mind and that wage liability and tort liability are not necessarily coincident. That the Missouri Court in the Brown case was thinking in terms of tort liability and even applying common law concepts is seen from these words on Page 416:

> "If a third person had been injured through Brown's negligent performance of the duties assigned to him, there can be no question that appellant would have been liable for Brown's negligent acts

although he received no pecuniary compensation for the performance of those duties."

Supporting our contention are the words of the Court in *Walling v. Jacksonville Terminal Co.*, 148 F. 2d at 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid to employees. We repeat what we said in Bowman v. Pace, supra (119 F 2d 861) that 'wages are due according to principles of contract, not of tort.'"

In this connection Judge Strum in Walling v. The Nashville, Chattanooga & St. Louis Railway (supra) said:

> "For the purpose of this Act whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable."

In Yellow Cab Co. of D. C. v. Magruder (supra) at Page 607, the Court said:

> "Many decided cases on generally similar factual situations have very properly held a cab company such as the plaintiff in this case, to liability to the public, even when the real relationship between it and the drivers of its cabs is not that of employer and employee, or master and servant."

In Bowman v. Pace Co. (supra) at Page 861, we find:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsythe was not an independent contractor, citing especially 39 C. J. Master and Servant, p. 38; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co. v. Smeltzer*, 6 Cir., 88 F. 2d 90, 112 A. L. R. 74. These cases and those cited

by C. J. relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed. §§665, 680."

III. Section 14 of the Fair Labor Standards Act is Applicable only in Event that Learners are Employed.

That portion of Section 14 of the Act applicable to this discussion reads:

> "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the *employment* of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under Section 6 and subject to such limitations as to time, number, proportion and length of service as the Administrator shall prescribe, ..." (Emphasis supplied).

Petitioner is in the position of claiming that this section means that all industrial learners are ipso facto employees. It seems clear, however, that this view just reverses the proper sequence. First an arrangement of employment must be entered into. A student does not become an employee simply by undertaking to learn an occupation on the premises of a business. Section 14 applies *if* a learner has in fact become an employee and not otherwise. Learners may be employed or they may not be employed and Section 14 applies exclusively to the former situation.

It is to be borne in mind that in the ordinary and well recognized case of an apprenticeship the apprentice is just as much an employee as the most highly skilled workman. The apprentice unquestionably works and his master unquestionably gets the benefit of what he does. The lower quality of his work and the fact that he is getting a peculiar benefit from his experience are customarily taken into account in the scale of wages paid but he is none the less an employee. A person such as the trainee in this case who receives no remuneration, produces nothing of benefit to the railroad, does only practice work and in performing any acts does so with a qualified employee present who could do the same thing, is being paid to do it and stands by idly while the trainee does it to train himself, is not an apprentice as that term has always been understood. The possibility of a future benefit to the railroad dependent upon eventual qualification of the trainee is unimportant. If a railroad should tell a young man that it would employ him as a rod and chain man if he completed a course of training at a school of civil engineering, no one would think of claiming that the young man was employed while going to school. The very voluminous Congressional history of the Act has been studied to ascertain whether any consideration was given to learners who were not employed and it is significant that no single indication has been found that any person in Congress or testifying before committees entertained the idea of application of the Act to learners who were not employed in the usual sense, who did not contribute to the extent of their ability to the business of the employer and who received no compensation whatever. It is true as stated by Magruder, J. (R. 142 Opinion) that Congress refused to grant employers a six months exemption, recommended by Mr. Taylor with respect to *employment* of learners and apprentices, from the minimum wage provisions of the Act and provided instead machinery for *employment* of

learners at rates to be fixed by the Administrator. However, one may search the Congressional Record in vain for any manifestation of intention to embrace by virtue of Section 14 learners who would not be employees except for the provisions of that section (83 Cong. Rec. 7389, 7391, 7393) or to limit opportunities for studying industrial occupations to persons who are employees or to impose upon all industrial learners an employee status as a matter of law. Certainly the understanding of Mr. Justice Jackson (then Assistant Attorney General) as indicated by his statements set forth on pages 26, 27 and 28 of brief of amicus curiae in opposition to granting of certiorari in this case, appears to have been that learners were apprentices hired by an employer. Petitioner must prove by reference to either (1) the literal wording of Section 14 or (2) the Congressional history of the Act, that all learners on industrial premises, whether or not employed in the sense that they could ordinarily expect remuneration are covered by the Act. The literal meaning of the words of Section 14, i. e., ".... the employment of learners....." refutes the contention of the Administrator, who has the burden of proof in an attempt to sustain his argument that Congress intended Section 14 to embrace all industrial learners; and who has been totally unable to point to a single statement by anyone in Congress indicating that all students of industrial occupations who are permitted to secure instruction on industrial premises are conclusively presumed to be employed or that Section 14 has that far-reaching purpose.

Sibley, J., in Walling v. Jacksonville Terminal Co. (supra) disposed of the Administrator's contention thus:

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the

industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the section does not apply for no wages at all are due." (Emphasis supplied).

At the end of his opinion in the Nashville case Judge Strum says:

"Nor are these trainees 'learners' as contempleted by the Act. A 'learner' is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the 'learner' though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The company gains no measurable benefit from their activities."

A simple example will serve to show that the Terminal Company's trainees are not suffered or permitted to work within the meaning of Section 3 (g) and even more clearly the manifest inapplicability of Section 14. Let us suppose that Portland Terminal Company, which owns and occupies several yards with tracks, switches and the usual facilities, should advertise in the Portland papers that commencing on a day certain Yard No. 9 would be

devoted to the training of any persons who desired to learn the duties of a railroad yard brakeman, and who could pass certain physical fitness tests; that qualified instructors would be present, furnished and paid by the Terminal Company; that the hours of training subject to the supervision and teaching of such instructors would be from 8 A. M. to 5 P. M. with an hour for lunch between 12 Noon and 1 P. M.; that the tuition would be $25 for a course to last until the trainee became qualified in the eyes of the instructor and in no event more than 14 days; that upon certification of qualification, the trainee's name would automatically "go on the board" and he would take his place and seniority among the railroad's yard brakemen; and that if he did so qualify he would be paid $4 a day for each 8-hour day spent training. Let us further suppose that this program was carried out by use of obsolete cars and engines in Yard 9, which is a storage and not an operating yard, and that the cars, engines, switches, etc., were operated for instruction purposes only and without reference to the normal business of the railroad. Let it be further supposed that the high wages and unusual social security known to be enjoyed by railroad trainmen induced Mr. Carle, a carpenter (R. 55), Mr. Carter, a laundry worker (R. 68), Mr. Widor, a storekeeper (R. 77) and Mr. Clark, a biscuit company employee (R. 79), to train a few days in an attempt to better their eventual earning power. Under such circumstances, a claim for wages as fixed by the Fair Labor Standards Act would verge on the ridiculous; and yet the Terminal Company would be suffering the trainees to work and they would be learning an industrial art on its premises, and applying the tests referred to by Mahoney, J., 155 F. 2d 215, 219 (R. 140 Opinion), there would be (1) physical and mental exertion, (2) a modified control by the Terminal Company, but (3) the work would not be pursued necessarily and primarily for the benefit of the latter. It thus appears that the

third factor is decisive. Absence of benefit to the alleged employer, in this case, destroys any implication that wages are due. Such absence is as clear in the facts on this record as in the example just set forth and upon analysis there is no fundamental difference between the two. Whether instruction be given with reference to movements of trains in a test yard or in an actual operating yard has no significance *provided that instruction and not work of benefit to the railroad is the purpose of the parties*. Practically, the trainee is better off financially and in every way under the actual practice than he would be in the circumstances of the given example.

It cannot be contended that the instruction given to trainees is a subterfuge whereby Portland Terminal avoids paying for service or work of value since the presence of the trainee is a disadvantage to the railroad (R. 123, 124, Opinion). For that reason, *Cotton v. Ottenheimer*, 3 Labor Cases, Par. 60326 (1941), is wholly inapplicable.

IV. The Findings of Fact of the District Court Judge Were Based Upon Substantial Evidence and Should be Affirmed.

Bound with this brief, as an appendix thereto, is the opinion of the Court written by Judge Peters. Opposite each and every finding is a marginal note citing supporting record references. It is thus conclusively proved that these findings of fact are thoroughly supported and indeed it is not understood that petitioner claims that any of them is unsupported or erroneous. It is too firmly settled that " Findings of fact shall not be set aside unless clearly erroneous. . . ." to permit of argument. See Rule 52 of Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c; *Sundt v. Turman Oil Co.*, 107 F. 2d 762 (C. C. A. 5th, 1939), and cases therein cited, at Page 764.

Of greater significance is the very clear tendency of courts of appeal to uphold conclusions of a trial judge even

where such conclusions are at least partly legal, since they are based upon subsidiary findings and the inferences to be drawn from the testimony which he heard. In the case of *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 64 S. Ct. 698 (1944), the trial court reached a conclusion that travel underground to place of work was part of the work week of miners of iron ore, which conclusion was based upon detailed subsidiary findings of fact in much the same manner as Judge Peters' conclusion of lack of employment in the case at bar was based upon his detailed findings of fact. It is plain that respect for the conclusions of the tribunal which heard and weighed the evidence impelled Mr. Justice Frankfurter and Mr. Justice Jackson to concur. The former said, at 321 U. S. 604:

> "An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress. And so, the application of this colloquial concept 'work-week' to the multifarious situations in American industry was left by Congress for ascertainment by judicial proceedings. These facts are to be found either by a jury or, as in this case, by a judge sitting without a jury. And so here it was the judge's duty to determine what time and energy on the part of the employees involved in this suit constituted a 'work week' of these employees of the petitioners. After a trial which lasted for about three weeks, during which testimony covering 2,643 pages was heard and voluminous exhibits were introduced, the District Court made its findings of fact. A judgment for the employees based on these findings was affirmed by the Circuit Court of Appeals. 40 F. Supp. 4; 135 F. 2d 320.
>
> "We have then a judgment of two courts based on findings with ample evidence to warrant such findings. Affirmance by this Court is therefore demanded."

Mr. Justice Jackson, at Page 605, upheld the conclusions of the trial court in these words:

> "After hearing a mass of conflicting testimony the trial court said of these activities, 'They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking.' These were found to be the facts by the two courts below and, whatever we might decide if we were a trial court hearing the evidence in the first instance, we cannot with our limited review hold them wrong on this record."

On the same page this very strong statement is made on the general proposition: "A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error."

In *Jewel Ridge Coal Corporation v. Local No.* 6167, 325 U. S. 161, 65 S. Ct. 1063 (1945) in which the conclusions of the two Courts below were opposite, four members of the Supreme Court would have held that bituminous coal miners were not employed during underground travel to place of work, partly because of conclusions and findings of the trial judge differing from those of the trial judge in the Muscoda case. Further indication of the importance attached to the conclusions of the fact-finding body is seen by the language of the Court in *N. L. R. Board vs. Hearst*, 322 U. S. 111 at 130, 64 S. Ct. 851 (1944), at 860 where Mr. Justice Rutledge in delivering the opinion of Court says:

> "In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate

conclusions, it is not the court's function to substitute its own inferences of fact for the Board's when the latter have support in the record. *Labor Board v. Nevada Copper Corp.*, 316 U. S. 105; cf. *Walker v. Altmeyer*, 137 F. 2d 531 (C. C. A.). Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *United States v. American Trucking Assns.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker v. Motor Boat Sales*, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp. v. United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Thus is stated a principle of law not to be invoked to sustain findings and legal conclusions in favor of a government agency or bureau and to be laid to rest when application is sought by a private defendant; so in this case, the determination of Judge Peters is to be accepted if it has "warrant in the record and a reasonable basis in law." The presence of those elements is susceptible of no reasonable doubt. Adverting to the case of *Skidmore v. Swift & Co.* (supra) and paraphrasing the words of Mr. Justice Jackson, at 65 S. Ct., 163, the trial judge was bound to give scrutiny and construction to the arrangement between the parties, appraisal of their

practical construction of the arrangement, and consideration of the nature of the "work" necessarily involving determination of whether the arrangement was one of instructor and pupil or one of employer and employee. Facts might have shown that the trainee was learning in order that he might be employed or that he was employed while learning. The law did not impose an arrangement upon the parties but it did impose upon the trial Court the task of finding what the arrangement was. The trial Court has discharged its function and has not decided that railroad trainees are, as a matter of law, not employees but has found that the trainees of Portland Terminal Company in the factual situations disclosed are not its employees in the commonly accepted meaning of the term nor as the term is used in the Act (R. 126 Opinion). It is clear that this finding must be allowed to stand as final unless it is ruled as a matter of law that any and all persons suffered by a business proprietor to enter upon his premises to learn an occupation must ipso facto become his employees. If there are exceptions in which a trainee or learner may not be an employee, then the findings of the trial Court are conclusive.

V. Trainees of the Portland Terminal Company Are Not Engaged in Commerce.

We announced at the outset that a decision of this court upholding the trial Court's conclusion that the trainees are not employees, settles the entire issue. On the other hand, the Administrator would not even under a contrary conclusion be entitled to an injunction under Sec. 15 (a) (2) of the Act for the purpose of preventing an alleged violation of Secton 6 without a showing that the trainees of Portland Terminal Company are "..... engaged in commerce or in the production of goods for commerce."

It is granted that respondent is engaged in interstate commerce but that is not the determining factor. The

question is whether the trainee is engaged in that commerce and, as we shall see, that depends upon whether he does work necessary to such commerce. There can be no question since the decision of *McLeod v. Threlkeld*, 319 U. S. 491, 6 3S. Ct. 1248 (1943), that the phrase "in commerce" is to be construed much more narrowly than "production of goods for commerce." (See Davisson, "Coverage of the Fair Labor Standards Act," 43 Mich. L. Rev. 867 (1945). This Court, in the case of *Armour & Co. v. Wantock, et al.*, 323 U. S. 126, 65 S. Ct. 165 (1944), at Page 167-8, has said:

> "McLeod v. Threlkeld .... which did exclude the employee from the scope of the Act is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce,' and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

In the McLeod case, the Court points out that in connection with Sections 6 and 7 of the Act, Congress rejected the phrase "engaged in commerce in any industry affecting commerce" in favor of the words now in the Act. The facts of the McLeod case are not parallel to those of the case at bar but certain language is quite illuminating. For instance, at Page 1251, Mr. Justice Reed says:

> "The test under this present Act, to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement so far as they are covered by wage-hour regulation are governed by the other phrase 'production of goods for commerce.'"

If we apply this test to the trainee, what is the inevitable conclusion? First, there is no evidence on the

record that the trainee's activities in any way aid the work of the Terminal Company or its employees; on the contrary, it is found that they retard the work and constitute a detriment. Indeed, since the trainee's functions are limited to observation and certain acts done under direct and personal instruction and supervision of an employee, it is questionable if the trainee does any "work" at all. In any event, it is clear that his presence and acts do not aid the commerce of the defendant.

The remarks of Mr. Justice Murphy in dissenting to the majority opinion of the McLeod case, make it clear that employees not essential to the carrying on of interstate commerce are without the Act. At Page 1254, he says:

> "The phrase 'engaged in commerce' should be broadly construed. In the words of one of the Act's sponsors the phrase extends to 'employees who are a *necessary part* of carrying on' a business operating in interstate commerce." (Emphasis supplied).

He further interprets the majority decision:

> "The effect of the Court's decision today, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it when the employee's activities are in transportation or connected therewith, to the narrow and legislatively repudiated view of the Shanks, Bolle, Commission and Bezue cases."

Since the respondent is engaged in commerce and not in the production of goods for commerce, it follows from Mr. Justice Murphy's interpretation of the decision that any person, employee or otherwise, not essential to commerce is not within the scope of the Act. Even if the Act were interpreted to extend coverage to "employees who are a necessary part of carrying on . . ." a business, these trainees, in no sense necessary or helpful to respondent in performance of its functions would still be without

the provisions of Section 6 of the Act. The conclusion is irresistible that a "trainee" regardless of his technical employment status is not essential to commerce for he is a student no part of whose duties are in furtherance of commerce and therefore that the Act does not fix minimum wage standards for him.

The point is that a student watching employees engaged in commerce doing certain acts and who himself does some unnecessary acts under supervision, plays no part in that commerce which would be better expedited without him. In the case of the trainee it is not so much that his work does not affect commerce but that he performs no work or service of value. He is just as non-essential to the business of respondent as he would be if he were training in a test yard and divorced from all contact with railroad operations.

It was unnecessary in the original case of Walling v. Jacksonville Terminal Co. (supra) to consider at length whether a trainee even if an employee was engaged in commerce. However, this point was not overlooked and in connection with it, Judge DeVane made the following statement:

> "Only those employees of defendant who are a necessary part of carrying on its business in interstate commerce are covered by the Act."

And in the case of *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10th, 1944), at 638, the Court said:

> "It is now established beyond controversy that to be engaged in commerce within the meaning of that phrase an employee must be actually engaged in the movement of commerce, or the services he performs must be so closely related thereto as to be for all practical purposes an essential part thereof. *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538; *Rucker v. First National Bank*, 10 Cir., 138 F. 2d 699 and *Clyde v. Broderick*, 10 Cir., 144 F. 2d 348. And in that connection *closeness depends*

upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce. Overstreet v. North Shore Corp. 318 U. S. 125, 63 S. Ct. 494, 87 L. Ed. 656; *Pederson v. Del. Lack. & West. R. R.*, 229 U. S. 146; 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430. If a cessation of the services of the employee causes an interruption or interference, with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof." (Emphasis supplied).

Can it be seriously contended upon the record in this case that cessation of activity by a trainee would cause interruption of or interference in the free movement of commerce? Since he is a non-essential and extra man who does not aid but rather hinders the full regular crew always on the job, the answer is obvious and inevitable.

CONCLUSION.

Respondent contends that the following propositions are conclusively established:

I. The findings of fact of the trial Court were fully supported by the evidence; he did not err as a matter of law in concluding from his findings that trainees are not employees of the Portland Terminal Company within the scope of the Fair Labor Standards Act, and his decree must stand.

II. Trainees of Portland Terminal Company are not essential to the commerce engaged in by that company nor a necessary part of carrying on its business and hence are not engaged in commerce within the meaning of Section 6 of the Act.

The decree of the Court below should be affirmed.

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APPENDIX A.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MAINE
(SOUTHERN DIVISION)

L. METCALFE WALLING, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR,
PLAINTIFF

VS.

PORTLAND TERMINAL COMPANY,
DEFENDANT

OPINION OF THE COURT

18TH JUNE, 1945.

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a) (2) and 15 (a) (5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

Record References and Name of Witness supporting each Finding of Fact.

Findings of Fact.

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities

R. 30, 24 Thomas

R. 38, 39 Thomas
R. 87-90 O'Neil
R. 108, 109 Dykeman

at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners." If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad however, as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

R. 39 Thomas
R. 64, 65 Morgan
R. 87, 88 O'Neil
R. 105 Johnson
R. 109 Dykeman

R. 33, 39 Thomas
R. 109, 110, 111 Dykeman

R. 107 Johnson.
R. 30, 31 Thomas
R. 103 Strout
R. 105, 106 Johnson
Exhibit No. 5, R.116, Offered R.29
Exhibit No. 7, R.118, Offered R.33

R. 30 Thomas

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

R. 85 Haney
R. 103 Strout
R. 105, 106 Johnson

R. 39 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The length of the training period, if completed, depends upon the apititude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

Exhibit No. 3, R. 114, Offered R. 27

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee. R. 39, 42 Thomas R. 90 O'Neil R. 102 Quincy R. 110 Dykeman

While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such. R. 39, 40, 42 Thomas R. 85-86 Haney R. 112 Dykeman

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business. R. 30 Thomas R. 106 Johnson

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows: R. 30-33 Thomas

> "Effective October 1, 1943, and for the duration of the present Emergency, Student Brakeman, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service. Exhibit No. 7, R. 118, Offered R. 33
>
> "Payment to be made if and when Student has qualified, is accepted for and takes employment.
>
> "If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point. R. 32 Thomas

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11 (c) covering the trainees.

Conclusion of Law.

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of paying trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling v. Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in Walling, Adm. v. Nashville, Chattanooga and St. Louis Ry., recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 335

L. METCALFE WALLING, ADMINISTRATOR,
Petitioner,
versus
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Respondent.

No. 336

L. METCALFE WALLING, ADMINISTRATOR,
Petitioner,
versus
PORTLAND TERMINAL COMPANY,
Respondent.

BRIEF OF JACKSONVILLE TERMINAL COMPANY, AS AMICUS CURIAE, IN OPPOSITION TO PETITIONS FOR CERTIORARI.

ELLIOTT ADAMS,
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BRIEF OF JACKSONVILLE TERMINAL COMPANY, AS AMICUS CURIAE, IN OPPOSITION TO PETITIONS FOR CERTIORARI.

SCOPE OF THIS BRIEF.

The above two cases involve the question of whether so-called "trainees" in railroad operations are employees under the Wage and Hour law (29 U. S. C. A. 201, 203 (d) (e) (g) *et seq.*).

Some years ago the Administrator conceived the theory that such trainees were employees, although the railroads, the unions, and the men themselves, were thoroughly satisfied with the arrangement under which it had been mutually agreed that they were not employees.[1]

The first suit brought by the Administrator was against the Jacksonville Terminal Company. After extensive hearing, since this was recognized as a test case, the District Court for the Southern District of Florida filed its findings and conclusions that the trainees were not employees, and denied the injunction sought by the Administrator. See *Walling v. Jacksonville Terminal Company*, 55 Fed. Sup. 302. We quote from page 304, the District Court's description of the trainee (expressly quoted and approved by the Fifth Circuit at 148 F. (2d) 768, 769):

> "None of the usual indicia of the employee relationship exists here as to the trainee. He is not subject to the rules of defendant applicable to employes; no control is exercised over his time; he is not required to report at any specified time; defendant has no right to demand or require work from him; *he comes and goes as he pleases; he is his own free agent*[2] and

[1] It is clear why the men voluntarily enter into the present arrangement. As it now stands, after undergoing a brief training period they then receive the full journeyman's contract wage. Immediately on being placed on the payroll they are paid the same as the men who have been there for years, instead of having to work up to that rate by degrees. As stated by the Court in Skidmore v. Swift (1944) 323 U. S. 134, 138, 65 S. Ct. 161, 89 L. Ed. 124, 128: "The law does not impose an arrangement upon the parties. It imposes upon the *courts* the task of finding what the arrangement was". Here the courts below have made exhaustive findings as to what the arrangement was—an arrangement satisfactory to everyone except the Administrator.

[2] Italics here and elsewhere throughout this brief are ours unless otherwise indicated.

both he and defendant understood and agreed he is not to be paid during the training period."

This case was appealed to the Fifth Circuit and on April 23rd, 1945, at 148 F. (2d) 768, the Fifth Circuit unanimously affirmed the judgment of the District Court.

The Administrator recognized that he could not overturn this decision in the *Jacksonville Terminal* case, and accordingly he did not file petition for certiorari.

Thereafter the Administrator brought suits against the Portland Terminal Company, the Nashville, Chattanooga & St. Louis Railway and the Norfolk Southern Railway Company. *He lost every last one of them.* Each specifically adopted and followed the reasoning of the *Jacksonville* case. To date the Administrator (while he has been before seven different courts) has not found a single one[3] which agreed with his attempt to substitute his social and economic views for what the railroads, the unions and the trainees had agreed on and practiced for so many years.

The *Portland Terminal Company* case was decided by the District Court of Maine, reported at 61 F. Supp. 345,

[3] This is particularly significant when we consider that the Administrator was able to and did carefully select the defendant and the jurisdiction for each case. Practically every railroad in the country has had the trainee system for many years. Accordingly the Wage and Hour Division could assay the situation and select the factual background which it thought most favorable to it. Moreover, the Administrator could bring his suits in the particular jurisdictions where he thought he had the best chance of winning. This is just what he did and he has brought to date (but lost) suits in the First, Fourth, Fifth, and Sixth Judicial Circuits. These were carefuly planned and tried test cases in four different circuits.

and, on April 29th, 1946, was affirmed by the First Circuit, reported at 6 W. H. Cases 26, 155 F. (2d) 215.

The *Nashville, Chattanooga & St. Louis Railway* case was decided by the District Court for the Middle District of Tennessee, reported at 60 F. Supp. 1004,[4] and was affirmed by the Sixth Circuit on June 1st, 1946, reported at 6 W. H. Cases 81, 155 F. (2d) 1016.

The *Norfolk Southern* case was decided on July 9th, 1946, by the District Court for the Eastern District of North Carolina, and is reported at 6 W. H. Cases 252. In addition to finding against the Administrator, it also taxed the costs against him.

Counsel for the Jacksonville Terminal Company file this brief as *Amicus Curiae* for the reason that the petitions for certiorari here are, in reality, an attack by indirection on the fundamental reasoning of the *Jacksonville* decision, since all of the other cases have followed it. This is true although the Petitioner (Pet. 12) is careful to explain the distinction between the *Jacksonville* and the other cases.

In the opinion of the Sixth Circuit in the *Nashville, Chattanooga & St. Louis Railway* case, for example, the Court said at page 82 of 6 W. H. Cases, 155 F. (2d) 1018:

> "The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we

[4] We invite a careful reading of Judge Strum's opinion here, for it is a masterful analysis of, and a complete answer to, the Administrator's various arguments *reiterated* in the Petition.

are satisfied with the reasoning thereof. To say more would constitute surplusage.

"The decree is affirmed upon the authority of that case and for the reasons indicated therein."

In the *Portland Terminal* case the First Circuit, after discussing at length the holding in the *Jacksonville* case, affirms the District Court and states at page 219 of 155 F. (2d):

"Hence we feel that the principles set forth in the Jacksonville Terminal Co. case are applicable here."

And the Petitioner (Pet. 12) says:

"Both courts relied heavily on *Walling v. Jacksonville Terminal Co.*"

We feel it our duty, therefore, to file this brief as *Amicus Curiae* and bring to the attention of the Court the applicable principles of the *Jacksonville* case, since what the Administrator is seeking here is in reality a reversal by indirection of the fundamental reasoning of the *Jacksonville* case through the medium of certiorari in these two cases.

Under the doctrine of *res judicata* the decision in the *Jacksonville* case has long since become final so far as the Jacksonville Terminal Company and its employees are concerned. None the less, there are numerous other situations in the Fifth Circuit, and elsewhere, similar to that at Jacksonville, which have relied on the *Jacksonville* case. It is important, therefore, that the reasoning there applied should not now be disturbed.

CONSENT TO FILING.

We have filed with the Clerk consent by all of the parties to the filing of this brief, in accordance with Rule 27.9 of this Court.

SUMMARY OF ARGUMENT.

I. Trainee is not an employee.

II. Trainee is not only not an employee but is *not an employee necessary or essential to commerce.*

III. There being substantial evidence to support the findings of the trial courts, their decrees should be affirmed.

IV. There is nothing in the Legislative history of the Act showing Congressional Intent to cover these trainees under the Act.

V. Section 14 of the Act (29 U. S. C. A. 214) does not cover these trainees.

VI. Wages are due according to principles of contract, not of tort.

ARGUMENT.

I. Trainee Is Not An Employee.

Seven courts have now had this situation before them, and each has come to the same identical conclusion—that the trainee was not intended to be, and is not, an employee.

In the *Jacksonville* case the Fifth Circuit at 148 F. (2d) 769, 770, said:

> "The district court summarized the situation thus (55 F. Supp. 302, 304):
>
> " 'None of the usual indicia of the employee relationship exist here, as to the trainee. He is not subject to the rules of the defendant applicable to employees; no control is exercised over his time; he is not required to report at any specified time; defendant has no right to demand or require work from him; he comes and goes as he pleases; and both he and defendant understand and agree he is not to be paid during the training period.' The conclusion of law is thus stated: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered nor permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the act.'
>
> "We approve the above summarization of the facts. The legal conclusion is quoted from an early decision of this Court, Bowman v. Pace, 5 Cir. 119 F. 2d 858, from which we see no reason to recede. The Act, Sect. 3(e) (g) defines 'employee' as any individual

employed by an employer; and 'employ' as including 'to suffer or permit to work'. The last quoted words do not mean that every one who permits some one to work for a third person or the worker's own self becomes an employer bound to pay statutory wages. They mean that one is an employer if he permits another to work for him, though he has not expressly hired or employed him. The mere fact that he could have prevented the service does not make him in all cases an employer. A purely voluntary service, for which no one intends there shall be pay, is not employment, but a gift. To permit another to work in my shop in making or repairing something for himself, would not make him my employee. *The words 'suffer or permit to work' must be understood with common sense.* In the present case the Company did suffer the trainee to work on its premises and with its appliances, but the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw switches or transmit signals, it was for his instruction. The Company was not benefitted, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee. And the parties had formally agreed that what was done was not for the Company, but for the trainee's benefit and that no pay was expected. The agreement was made in good faith and represented the truth of the relationship. The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions

of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. *We see no occasion to give an unreasonable interpretation to its words to upset this practice, apparently satisfactory to all concerned.*"

In the *Portland* case the First Circuit prefaces at 155 F. (2d) 217 its discussion (which concludes that the trainee is not an employee) with these pungent and self-answering questions:

> "But did Congress intend to include in the classification of employees all persons whom an employer suffers or permits to work? Did Congress intend to compel an employer to pay the minimum wage required by the Act to a person who voluntarily and purely for his own benefit seeks to labor under an employer's control? Suppose an author desired to work in the train yards in preparation for writing a novel and requested the Portland Terminal Company to give him an opportunity to do so. Would the Terminal Company be obligated to pay him the minimum wage, when the author neither sought nor expected pay? It hardly seems that Congress intended the act to cover such an individual."

And in the *Chattanooga* case the Sixth Circuit (at 6 W. H. Cases 81, 155 F. (2d) 1017) specifically approves findings of fact made by the District Court (reported at 60 F. Supp. 1004), from which we quote:

> "When a trainee enters upon his training, he does not regard himself as an employee, nor does the

Company so regard him. * * * During the training period the Company exercised no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee.

"No orders are issued to him * * *. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, * * *.

"Students are present on the job purely for their own benefit and advantage, in order to qualify themselves for future employment. * * *"

In the *Norfolk Southern* case, 6 W. H. Cases 252, 254, the Court made findings of fact very similar to those in the *Chattanooga* case just quoted from, and reached the same conclusion. In addition, at page 255, the Court made the significant finding of fact that no one but the Administrator had any complaint to make as to the trainee program either before or since the filing of the suit.

In *Williams v. Jacksonville Terminal Company*, (1942) 315 U. S. 386, 398, 62 S. Ct. 659, 86 L. Ed. 914, 925, this Court held that although Red Caps were suffered and permitted to work by this same terminal company and did the essential work of handling baggage in interstate commerce, yet if they had not agreed with the terminal company on the terms of their employment they *would not be employees*. We quote the Court's exact language:

"If the red cap did not accept the terms offered, *he would be a volunteer and not an employee*. As a

> volunteer he could probably keep his tips but would not be entitled to a contractual wage."

The Court in the *Red Cap* case went to the very heart of this controversy and pointed out that under the Act the relationship of employee and employer is a *contractual* one. In view of the specific findings of all of the trial judges who have heard the evidence, it is impossible for us to reconcile the Administrator's position with what the Court has said in the *Red Cap* case.

We conclude this portion of the brief with what the Court said in the *Tennessee, etc., Company v. Muscoda Local 123,* (1944) 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949,

> "And in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words were *commonly used*—as meaning physical or mental exertion (whether burdensome or not) *controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.*"

Here the railroads neither controlled nor required the efforts of the trainee, and seven courts have agreed his efforts were necessarily and primarily for his benefit—rather than that of the railroads.

II. Trainee Is Not Only Not An Employee But Is NOT AN EMPLOYEE NECESSARY OR ESSENTIAL TO COMMERCE.

Petitioner recognizes his obligation, as shown by the affirmative allegations of his complaints in the various cases, to show that trainees *are employees essential to commerce.*

This Court in *McLeod v. Threlkeld,* (1943) 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, has held that it is not the work of the employer that matters but the work of the individual employee concerned. And, as pointed out in that case, since numerous railroad employees are not covered by the Act, such as workers in repair shops on facilities to supply power for machinery used in repairing instrumentalities of transportation, or workers who heat the cars and the depot, or who store fuel, or workers who work on locomotives and cars when withdrawn for the moment from commerce for repairs, or cooks, or elevator operators, or building service employees, because not necessary to commerce, just so the trainees here are not covered for the same reason.

The Administrator throughout this whole series of litigation *either does not perceive or deliberately chooses to ignore the fundamental distinction between a man who is hired to do a job and is responsible for it and a mere volunteer who comes and goes as he pleases.*

As pointed out in the various findings of fact in the several cases, under their union contracts the railroads are

required to keep a full crew. The trainee is merely a fifth wheel. Whatever the trainee does is done while a man more experienced and better able to do it, and charged with the responsibility therefor, stands by. It is only common sense that the trainee necessarily slows down the work of the crew, as the crew must not only show him what to do and how to do it, but, in addition, protect the trainee and see that he does not get hurt.

Merely demonstrating ability or acquiring skill in a job does not make the trainee necessary or essential to commerce. Since the crew is a full crew, and can and does do its work irrespective of the trainee, the trainee is in no sense essential or necessary to commerce or engaged in commerce.[4a]

III. There Being Substantial Evidence To Support The Findings Of The Trial Courts, Their Decrees Should Be Affirmed.

There is no need to labor this point for nothing is better settled than that findings of the trial courts, approved by the Circuit Courts of Appeals, will not be disturbed by the Supreme Court.

IV. There Is Nothing In The Legislative History Of The Act Showing Congressional Intent To Cover These Trainees Under The Act.

In the *Jacksonville* case, after the argument of counsel, lasting the better part of a day, the trial Judge himself inquired if there were anything in the legislative history

[4a] See syllabus 6 at 55 F. S. 302, 304, where the Court so held.

to throw light on the coverage of these trainees. In response to this query, both sides made exhaustive investigation of the legislative history. We attach, as Appendix "A" to this brief, our historical study submitted to the District Judge. It is significant that not only Judge DeVane in the *Jacksonville* case, but all of the other courts which have since gone into the question, have come to the same conclusion and stated in so many words that there was no intention on the part of Congress to cover these trainees.

V. Section 14 Of The Act (29 U. S. C. A. 214) Does Not Cover These Trainees.

At the conclusion of the argument in the *Jacksonville* case, Judge DeVane further asked if Section 14 could have any possible bearing. This came after the Administrator's counsel had demonstrated clearly that he appreciated the fact that Section 14 had no application by not even mentioning it during the course of his extensive argument.

In the petition here the Administrator again attempts to resurrect Section 14, although, as pointed out by the Fifth Circuit at 148 F. (2d) 770, and by the First Circuit at 155 F. (2d) 219, Section 14, by its "very wording, *presupposes employment*" and we have no "employment" here.

And as said by the Sixth Circuit at 155 F. (2d) 1018, "If trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away".

See also the *Chattanooga* opinion at 60 Fed. Supp. 1004, 1008, where the Court points out that "a learner is an '*employee*' who labors *in the interest of* and for the benefit of his employer * * *", factors not present here.

VI. Wages Are Due According To Principles Of Contract, Not Of Tort.

As cited on pages 20 *et seq.* of the Petition, there are *some* [5] cases which hold that trainees who are performing duties for a railroad at the time they are injured or killed, are employees insofar as a suit against the railroad *in tort* is concerned. None of these cases involves wages. One of these very cases relied on and *cited by Petitioner*, that of *Atchison, etc. v. Fronk*, (1906) 74 Kan. 519, 87 Pac. 698, squarely held:

> *"It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration."*

Moreover, as said by the Fifth Circuit, in answering this same contention, at 148 F. (2d) 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid employees. We repeat what we said in Bowman v. Pace supra (119 F. 2d 861) that 'Wages are due according to principles of contract not of tort.'"

[5] There are cases to the contrary. See Fineberg v. Public Service Ry. Co. (N. J. 1919) 108 Atl. 311; Wilkes v. Buffalo R. Co. (Pa. 1907) 65 Atl. 787, 788, 789; Lederson v. Cassidy (N. Y. 1921) 187 N. Y. S. 50; and Norfolk R. Co. v. Bondurant (Va. 1908), 59 S. E. 1091.

CONCLUSION.

The Petitioner gives as the reasons for granting the writs that the decisions of the Courts below "are out of harmony with the statutory definition of employment, the clear purpose of the learner provisions of the Act, and even the common law tests of the employment relation". (Pet. 13.)

As stated by the Fifth Circuit at 148 F. (2d) 770, "The words 'suffer or permit to work' (the statutory definition) *must be understood with common sense*", and that is what seven courts have done. The same seven courts have further found that the learner provisions of the Act, by the specific terms of Section 14, *"presuppose employment"* and that there is no *employment* here. As to the common law tests of the employment relation, no one has even suggested that the trainee could go to Court and recover wages from the railroads under the common law.

We repeat again what the Court said in *Skidmore v. Swift, supra,* that *"the law does not impose an arrangement on the parties.* It imposes on the *courts* the task of finding what the arrangement was". And no one could have had a more definite and clearly understood legally binding contractual arrangement than that which all seven courts have found the Railroad Brotherhoods, the trainees and the railroads worked out and practiced here.

We respectfully assert, therefore, that none of the Petitioner's "reasons" are valid; and that this arrangement

mutually agreed on and satisfactory to the railroads, the unions and the trainees for so many years, should not now be disturbed.

The petitions for certiorari should be denied.

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September, 1946.

APPENDIX "A"—Reprint of Historical Study of Act submitted to District Court in Jacksonville Case.

There Is Nothing in the Legislative History of the Act Showing Congressional Intent to Cover These Trainees Under the Act.

The light to be sought in the legislative history is that thrown on the purposes of the Act (29 U. S. C. A. 202). They are: to remedy "labor conditions detrimental to the maintenance of the minimum standard of living" of workers engaged in interstate commerce because a substandard

"(1) causes commerce * * * to be used to spread and perpetuate such labor conditions among workers of the several states;

"(2) burdens commerce * * *;

"(3) constitutes an unfair method of competition in commerce;

"(4) leads to labor disputes burdening and obstructing commerce * * *; and

"(5) interferes with the orderly and fair marketing of goods in commerce."

It is manifest to anyone who heard the testimony or reads the record in this case that the arrangements under which the trainees become qualified for employment by the Terminal Company

(1) do *not* cause "commerce * * * to be used to spread and perpetuate" those arrangements "among workers of the several states" (Those arrangements admittedly are time honored and universally existent with terminal companies);

(2) do *not* "burden commerce";

(3) do *not* constitute "an unfair method of competition in commerce" (For they are used by all terminal companies (Wilkes, R. 313));

(4) do *not* "lead to labor disputes burdening and obstructing commerce" (Wilkes offered to but was not permitted to say so (R. 313), as to the Terminal Company, and there is no suggestion that the arrangements have caused such disputes in other terminals);

(5) do *not* "interfere with the orderly and fair marketing of goods in commerce."

Further, the declared policy of the Act (29 U. S. C. A. 202 (b)), is, where the detrimental conditions aimed at do exist, to eliminate them "as rapidly as practicable * * * without substantially *curtailing employment or earning power.*" The arrangements here attacked by the administrator not only do not "curtail" employment by the Terminal Company—they extend it to persons who in the absence of the company's training program could never qualify for such employment; and instead of "curtailing" earning power they enlarge it.

It was on the foregoing considerations that we submitted at the oral argument, and submit still, the appropriateness to this case of the statement of the Supreme Court in *McLeod v. Threlkeld*, decided June 7, 1943, 87 L. Ed. 1538, 1542, 319 U. S. 491, 495:

> "The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act."

A refinement more refined than that by which the administrator here seeks wages for men who in the thought of nobody else ever were employed, instead of being content to restrict his activities to the enforcement of the payment of minimum wages and the maintenance of maximum hours which confessedly were the great objectives of the Act, would be hard to imagine.

In searching the Act's legislative history therefore, we do so in the light of the declared purposes and policy of the Congress and of the just quoted statement of the Supreme Court.

The result of our search has been that nothing has been found to cash doubt on our submission that "any individual" does not come within the Act unless he is an "*employee*" * * * employed by an "employer". (29 U. S. C. A. 203 (e)).

We find nothing to indicate that if Congress had meant literally that any and every individual suffered or per-

mitted to work was an employee, adequate language to express that concept clearly would not have been used in an Act whose verbiage throughout is precise, cleancut and specific.

And we find nothing to indicate either that Congress meant to wipe out our conception of the legal relation of master and servant by general, obscure and ambiguous language in an Act drawn otherwise with precision, clarity, and definiteness.

We also do not find, as he is quoted on page ten of the administrator's brief as having said, that Senator Black stated that the definition, "'*employ' includes to suffer or* permit to work," is "the broadest definition that has ever been included in any one Act." What Senator Black did say was as follows, and in a wholly different connection: The question before the Senate was whether producers and packers of fresh fruits and vegetables should be included in or excluded from the operation of the Act. In response to a question from Senator Copeland, Senator Black said:

> "The committee, after careful consideration reached that conclusion that the definition of *employees* as given in paragraph (7) of Section 2 and which is the broadest definition that has ever been included in any one Act, was sufficient to include every genuine *bona fide* farming activity" (81 Cong. Rec. 7657 (1937)).

Though not strictly within this portion of this brief, it may as well be noted here as elsewhere, that while the Congress has almost uncontrollable discretion in adopt-

ing definitions of its own, it could not have changed, if it had tried, the essential, long-recognized nature of the relationship of master and servant, merely by adopting its own definition of the word "employ". Our authority for this statement is *Carter v. Carter Coal Company*, 298 U. S. 238, 289, 80 L. Ed. 1160, 1177 (holding an imposition designated by a statute as a "tax" to be in legal reality a penalty):

> "While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own (citing cases) that device may not be employed so as to change the nature of the acts or things to which the words are applied."

That case has not been disavowed by the Supreme Court, even in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. Ed. 1263, for there they were construing, not the Act held unconstitutional by the *Carter Coal Company* case, but instead the Bituminous Coal Act of 1937 which Congress had passed as a sequel to the *Carter* case. And so, while Congress had full power to ignore the ordinary meaning of "employ" and adopt a new definition of it, that "device" did not change the nature of employer and employee or the nature of the relation between them.

The original Senate Bill (S-2475) read, in Sec. 2 (a) (7):

> "'*Employee*' includes an individual employed or suffered or permitted to work by an employer."

This is the same definition that was stated at the oral argument by counsel for the administrator. It is not, of course, the definition of the Act itself which is as follows:

> "(e) 'employee' includes any individual *employed* by an employer."

No special attention apparently was paid by the Congress to the definition (29 U. S. C. A. 203 (g)) that " 'employ' includes to suffer or permit to work". All the discussions seem to have used the words "employer" and "employee" in their conventional sense. For example, in foot-note 1 to 29 U. S. C. A. 206, it is said of the Congressional Committees' handling of the point whether the Act should apply to all persons employed by an employer who was engaged in commerce, or whether it should apply only to such persons as themselves were engaged in commerce:

> " 'Section 6 of the conference agreement provides for the establishment of minimum wages for *employees* engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the *employer* was engaged in commerce in any industry affecting commerce. * * *'
>
> " 'Section 7 of the conference agreement provides for the establishment of maximum hours of employment for *employees* engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the *employer* was engaged in commerce in an industry affecting commerce. * * *' "

The Senate Bill was referred to the Committee on Education and Labor, and in its report (No. 884) July 6, 1937, is this language—certainly not descriptive of the trainees with the Jacksonville Terminal Company:

> "It is only for those low-wage and long-working-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to obtain a minimum wage."

In similar vein, the House Committee on Labor said in its report (No. 1452) to the House of Representatives on August 6, 1937:

> "It (the bill) only attempts in a modest way to raise the *wages* of the most poorly paid workers and *reduce* the *hours* of those most overworked."

The objectives of the pending bill were thus described by Madam Secretary Perkins (Joint Committee Hearing, Part 1, page 177):

> "The present draft of the fair labor standards bill has three main objectives. First, to exclude from the channels of commerce goods produced by industries *employing* child labor and engaging in other oppressive labor practices. Second, to *establish* basic non-oppressive *wage and hour standards* and to apply them as rapidly as possible to industries of an interstate character; and third, to create a board to fix fair minimum wages and a reasonable workweek for industries where the *bargaining power of workers* has not been sufficiently great to achieve fair working conditions and collective agreements" (J. H., Part I, p. 177).

Even the thumbing through of the voluminous debates on the bill while it was pending, particularly before the Senate, demonstrates that those were the objectives of which everybody was thinking; and that *nobody had any idea, or at least never expressed any idea, that a tricky definition would be written into the bill serving the purpose of making employees out of people who had never been hired, who had been promised no wages, who expected none, who came and went as they pleased, and were under no obligation of any sort to the one whom the bill nevertheless would compel to pay them.* For example, Senator Black, in opening the discussion of the bill generally, said (81 Cong. Rec. 7648):

> "The general purpose of the bill, legislatively speaking, is a three-fold one.
>
> "It provides a method of obtaining the objective of minimum wages and maximum work hours * * *
>
> "There is one provision of the bill which * * * would authorize action in connection with those businesses and industries that are seriously competing with and have a substantial effect upon the flow of interstate commerce.
>
> "The third objective of the bill is to prohibit the transportation in interstate commerce of goods which are produced by the work of children."

Senator Borah, a member of the Senate Committee having the bill in charge, felt (81 Cong. Rec., p. 7793) that the crux of the matter before the Senate was "how shall we reach the problem of minimum wages and maximum hours. I feel that every man or woman who is worthy of *hire* is entitled to sufficient compensation to maintain

a decent standard of living. It is upon that theory that I proceeded to the consideration of the measure, and upon that theory I now consider it."

Throughout his ensuing discussion such statements as these occur (p. 7796, *et seq.*):

> "I take the position that a man who *employs* another must pay him sufficient to enable the one employed to live. * * * If he cannot afford to pay it, then we should close up the business. * * * I insist that American industry can pay its *employees* enough to enable them to live * * * I am opposed to peon labor whether it is employed by one man or another."

Senator Walsh during his address to the Senate made the statement (p. 7800):

> "The purpose and intent of the bill is that the poorest, the lowest, the humblest *wage earner* in this country should not be left helpless because he has not the facilities of a *labor organization* to help him enjoy social justice."

At the joint hearing before the Senate Committee on Education and Labor and the House Committee on Labor, the following colloquies occurred between the Representatives named below and (the then Assistant Attorney General, now Mr. Justice) Robert H. Jackson:

> "Representative Fitzgerald: What provision is there in the bill to *aid the handicapped or the subnormal worker*?
>
> Mr. Jackson: That is at page 19 of the Senate Bill, where the regulations or orders of the Board may provide for—the *employment of learners* and appren-

tices *at such wages lower* than the applicable wage and subject to such limitations as to time, number, proportion, and length of service as the Board shall prescribe; * * *

Representative Fitzgerald: Then this Board will have the power to grant exemptions to the *aged*, the *handicapped*, and the *subnormal* workers? * * *

Mr. Jackson: Yes, sir.

Representative Griswold: You spoke a while ago of the difference in the efficiency of labor. In this bill in section 19 you mention learners and apprentices. Does the bill at any place define learners and apprentices, that you recall?

Mr. Jackson: I do not recall any definition of learners or apprentices.

Representative Griswold: The reason I ask that question is this. Under the N. R. A. in the garment industry, they *employed* girls, and in a number of factories with which I am familiar, they put them on one machine, and for a certain length of time they were learners. Then they learned that machine and they were transferred to another machine and they were still learners. And I have some affidavits in my office of girls that performed as much as 6 months, the operations in a factory, worked say 6 months in a factory on numerous machines, and they were always learners. They never even received the minimum pay because they were always learners.

Mr. Jackson: *That is exactly why the provisions are in here* which your colleague pointed out which authorize the Board, when they give the authority to *employ* learners or apprentices, to fix the limitations as to the time, the number, the length of time,

and the service, so that they cannot pull that kind of abuse under this act if it is effectively enforced" (Pages 37, 38 and 44, Part I, of Joint Committee Hearing).

Representative Fitzgerald and Mr. Jackson, discussing Section 14, said (Joint Committee Hearing, Part I, pp. 37, 38):

"Representative Fitzgerald: But it does give the Board the power to increase or decrease the amount of apprentices?

Mr. Jackson: Yes, sir.

Representative Fitzgerald: Would there not be some conflict there with organized trades that already limit the number of apprentices?

Mr. Jackson: No; I think not. There is no such purpose here—in the first place, there could not be anything that would *require the employer to hire apprentices.* It would merely be a permission, and he would still have to deal with his union in the case of collective bargaining, and the provisions of the act which are intended to protect collective bargaining would prevent that as a practical matter."

On page 20 of his brief plaintiff seemingly attempts to show that the fact that Congress did not adopt an amendment to exempt from the Act the "employment" of learners for the first six months, has some bearing on the case. Surely there is no analogy. The amendment is not relevant. In the first place, the amendment covered "employment", a situation not presented here. Secondly, and undoubtedly the reason Congress refused to adopt the amendment, six months is an unreasonably long period

(The average trainee here, for example, trained about six days).

But let us see just what is done during this training period. There are two phases to the knowledge, experience and training necessary to qualify firemen, hostler-helpers and switchmen employees of the defendant.

One is a knowledge of the trade or employment; i. e., a fireman must know how to lay his fire, put on coal, put water in the boiler, etc.; and a switchman must know how to throw switches, give signals, couple and uncouple cars, and connect and disconnect air and steam hose, etc. When a man has such knowledge and experience he can apply his knowledge on any train, wherever it may be, just as a welder or a riveter who understands his trade can work in any shipyard. This may be called knowledge of the trade.

The other phase to qualify a man as an employee of defendant (or any other railroad for that matter) is a knowledge of the particular terminal plant, its track layout, switches, lights, signals, etc. This may be called knowledge of the yard. Most of the trainees for defendant are either new to railroad terminal activities, or if they have ever worked for a railroad it has been so remote that for practical purposes they are "inexperienced" men. Accordingly it is safe to say that the trainees as a whole acquire their knowledge of the yard as they acquire their knowledge of the trade. The former is an incident to the latter.

All of the witnesses testified to the intricacy of the defendant's yards, tracks, interlocking systems and switches. All of them agreed that it required considerable time and study to learn and understand the signals, rules, regulations and the yard layout. These features are all peculiar to the defendant's plant and before a man can be employed to work there, he must, for safety to himself, his fellow-employees and the public, have learned and know the layout of the yard, tracks, switches, systems, signals and other facilities, and generally acquire the knowledge of the yard.

But in so acquiring the training, whether it be as to the type of work generally or the characteristics peculiar to the defendant's yard, the trainee is not an employee but is a volunteer. *He has not agreed to work* under the principles of contract law stressed by the Supreme Court in the redcap case. He is in the yard *on his own*, as a free agent, subject to his own whims and caprices. He may never work for the defendant—some of the trainees do not. *If* he likes the work and is adapted to it, he *may*, at *his* option, seek and secure employment. It is perhaps significant that in the few instances where an experienced railroad man has gone through the training, it has only taken him a day or so to qualify for *employment*. This may possibly have something to do with the willingness of all trainees to accept the status of volunteers through the training period.

And so defendant submits that in the light of the Congressional history hereinabove discussed and outlined, it was not the intent of Congress that the inclusion of a few

so-called experienced men with the inexperienced men in defendant's training program should affect the status of such men as volunteer trainees on defendant's property.

We repeat: There is nothing in the legislative history of the Act which suggests, even remotely, that Congress intended that the Act should apply to individuals who were not already employees, whose activities did not originate from any agreement or contract with an employer. On the other hand the record plainly implies that everybody concerned with the new legislation considered that it would be directed to those individuals who work pursuant to a contract of employment whereby the employer agreed to pay wages and employees agreed to observe the duties of their employment—in short that the Act, as it is popularly known, was a "wage and hour law" for the benefit of persons who already were employees, and not a law intended unsuspectingly to transform into employees persons who never had been such employees.

Section 14 of the Act (29 U. S. C. A. 214) Does Not Cover These Trainees.

The very first words of section 14 indicate that it is dealing with a status of employer and employee already existing, and not creating a new status. It says: "The administrator, *to the extent necessary* to prevent curtailment of *opportunities for employment* shall * * * provide for (1) *employment* of learners", etc.

Furthermore, this record does not show, or even suggest, that it is "necessary" to any "extent" that the Ter-

minal Company's hitherto successful and satisfactory training program cannot proceed without the benefit of Section 14.

And, as already submitted in another connection, whatever else the arrangements here between the Terminal Company and the trainees do, they do not curtail, but on the contrary extend and enlarge, opportunities for employment.

In addition, general rulings of the administrator show that at least when they were promulgated he was not of the view that nobody could learn a trade without becoming an "employee", so-called, of the very man from whom he hoped, having learned the trade, to obtain employment.

The administrator's Interpretative Bulletin No. 13 (as revised November, 1940) deals, in Section 15, with training courses made available by employers for their employees, and prescribes four conditions in the presence of which attendance by an employee is "not to be considered hours worked". The *purpose* of such conditions, it is therein said, "is to prevent exploitation of labor in violation of the Act by using alleged training programs to effect a stretch-out or speed-up in the work of employees in their present position"—something disavowed by the Terminal Company, not claimed by any witness, and not suggested by anything in the record.

Regulation 522.1 (29 U. S. C. A., p. 600), dealing with "Application for Learners", prescribes that "Application

may be made by any employer to the administrator * * * to *employ* learners * * * whenever employment of learners at such lower rate is believed *necessary* to prevent curtailment of employment opportunities".

The mere reading of that language by those who heard the trial and the oral arguments suggests that there is nothing compulsive on the Terminal Company as to the circumstances comprising the trainees' relations with it; that it does not desire to "employ" *learners*, until they become qualified to do the company's work; and that when they do, they are employed, not as learners, but as full-fledged employees. Nobody believes—the Terminal Company, the trainees, the administrator himself—that the "employment" of "learners", visualized by Section 14, is necessary to prevent the shutting of the door of opportunity in the face of men who want to work for the Terminal Company, or to quote from the Section, "to prevent curtailment of opportunities in such plant".

What Congress had in mind when it enacted Section 14, as shown by the Congressional history, was to guard against exploitation of low paid employees in the sweat shop. For in the sweat shop there were actually employed, under the guise of "learners" or "apprentices", *bona fide* workers who were under the direction and orders of the employer and from whose sweat and toil the employer reaped economic benefit. Congress never intended Section 14 to cover volunteer trainees who were not exploited, from whom the employer received no economic benefit, and who were *not employed*.

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No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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The Railway Labor Executives' Association respectfully presents this motion that leave be granted to the said Association to file the accompanying brief as *amicus curiae* in the above-captioned case, and in support thereof shows the Court:

I. Pursuant to paragraph 9 of Rule 27 of the Rules of this Court the undersigned counsel for the Railway Labor Executives' Association requested the consent of the Acting Solicitor General and of counsel for the respondent to the filing of this brief. The Acting Solicitor General granted his consent, but counsel for the respondent declined to do so.

II. The Railway Labor Executives' Association represents 19 of the 21 standard railway labor organizations. A list of the organizations represented in the Association is set forth in the Appendix. These organizations are the collective representatives under the Railway Labor Act of the employees in the great bulk of the jobs on which trainees are engaged on respondent and on other railroads where similar practices prevail. They therefore represent many persons who will be very substantially affected by the Court's determination and whose interests are not identical with the interests represented by either of the parties.

This motion is made and the attached brief submitted for filing in No. 335 since it is in that case that work under the jurisdiction of these organizations is involved. However, since that case is being heard jointly with No. 336, there have been included, where appropriate, references to the record in No. 336.*

WHEREFORE we respectfully pray that the Court waive the requirement of consent as set forth

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* We have followed the system used in the Government's brief of designating the record in No. 335 by "CR" and that in No. 336 by "PR."

in paragraph 9 of Rule 27 and that leave be granted to file the accompanying brief.

Submitted by

LESTER P. SCHOENE,
Attorney for Amicus Curiae.

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

STATEMENT

It is not our purpose to restate the facts or to reiterate the argument made by the Government, to which we subscribe, nor to add to the authorities that have been brought to the Court's attention by the parties. We seek only: I, to place before the Court our analysis of the determinative issues, and II, to clear up certain misconceptions concerning the employees' participation in and attitude toward the establishment of the practices of which the Administrator complains.

ARGUMENT

I.

Analysis of Determinative Issues

A. *If the Fair Labor Standards Act means what it literally says, the Court below is in error in not holding the trainees involved to be employees.*

Under the applicable definitions in Section 3 of the Act an " 'Employee' includes any individual

employed by an employer" and " 'Employ' includes to suffer or permit to work." There is no denial that respondent is an employer under the Act and that it does suffer and permit trainees to work. Both in this case and in No. 336 the courts below find it necessary to admit, either expressly, or impliedly by adding qualifying words to the statutory definition, that if the definition of "employ" is to be literally applied these trainees must be held to be employees (PR. 137, CR. 381).

We do not understand respondents to urge otherwise. Instead the argument in support of the decision below, both in this case and in No. 336, in the opinions below and on the part of respondents here, although variously stated comes in summary to this: The Act's definition of "employ" cannot be taken literally because this would give employee status to anyone who exerts any energy anywhere which the alleged employer had the power to prevent but did not prevent. Since such a construction would be absurd it is necessary to limit the application of the definition to situations where there is an express employment contract or where one can be implied from a balancing of the relative benefits directly and primarily flowing to employer and workman from the doing of the work. Hence, if the workman derives the benefit of learning a job and the employer could get the specific work of a trainee done as advantageously by others a trainee is not "employed" within the definition unless there is an express contract of employment. The argument then addresses itself to the applicability of the learner regulations provided in Section 14 and points out that they apply only where

learners are *employed* within the definition as limited in the preceding argument. Support of the decision below is therefore wholly dependent upon the proposition that sensible construction of the definition of "employ" requires that the term be limited to the degree that the argument suggests.

B. *Construction of the Act requires no such circumscription of the term "employ" as the argument in support of the decision below asserts.*

It may readily be agreed that the Act's very broad definition of "employ" was not intended to embrace all exertion of energy that the alleged employer had the power to prevent but did not prevent. But it does not follow that the alternative is a construction that virtually reads the definition out of the Act.

All that is necessary to avoid an obviously unintended application is to have it understood that "to work" means the doing of work which, in some substantial sense, is the work of the employer. *Cf. Linstead* v. *Chesapeake & Ohio Ry. Co.*, 276 U. S. 28. Such an understanding of the term "to work" at once disposes of such hypothetical cases as that of the permittee who enters upon the premises to do a repair job of his own or to do the work of a third party, and that of the bona fide student receiving instruction in a training school where only make-believe work is done. In the case of the novelist (PR. 138) it would make employee status depend on whether he was a mere observer or whether he participated in the doing of the work. We are not shocked at the prospect of holding the

Act applicable to such a novelist who is expected to and does participate in doing the work, for it is our understanding that it is the purpose of minimum wage legislation to prevent work at subminimum wages regardless of whether the motive impelling the acceptance of such work is economic necessity, hope of collateral reward, or anything else.

The court below (CR. 381) uses the terms "work for it" and "worked for appellee." Such terms would be unobjectionable if understood to be synonymous with "doing the appellee's work." But it is plain from the decision that the court did not so understand them. The controlling test of whether the trainees "worked for appellee" as used by the court below is made to depend upon whether the appellee or the trainee derived the most immediate and direct benefit from doing the appellee's work in the particular way in which it was done.

The test of how advantageous or lacking in advantage to the employer or the workman may be the particular arrangement under which the work is done is irrelevant to a determination of whose work it is. It is sufficient that the employer chose to have the work done and chose to have it done under the arrangement. Little imagination is required to conceive of innumerable situations in which an employer, in consideration of more remote advantages, real or supposed, would choose to have work done under arrangements which in relation to the performance of the particular work are less efficient than available alternative arrangements.

C. *The record conclusively shows that the trainees here involved were expected to and did do the respondents' work.*

Both in this case and in No. 336, paragraph VIII of the complaint alleged that "said employees are actively engaged in the performance or operation of some essential phase of defendant's activities or facilities." (CR. 4-5, PR. 4.) The findings of the district courts in both cases, not disturbed on appeal, put it beyond dispute that this allegation was proved: "The student learns not only by observation, but by actually performing the duties of the employment he seeks" (CR. 366); "gradually permitting him to do the actual work under supervision." (PR. 123.)

We do not contend that the construction suggested in the preceding section affords a magic formula by which all close cases automatically solve themselves. At the outer limits of the Act's application there will, under any construction, be debatable cases that may be difficult to decide. But it is submitted that the construction suggested is susceptible of application so as to avoid the inclusion of any situations which Congress clearly did not intend to cover. And the present case presents no debatable issue as to whether the work the trainees do is respondent's work.

D. *Weighty considerations of judicial administration require that the balancing of relative advantages to employer and trainee be left to the Administrator.*

A holding that these trainees are employees, of course, does not mean that the minimum wage must

necessarily be paid. Congress foresaw that precisely such considerations of relative advantage to employer and trainee as are urged by respondents here might in some circumstances have a proper bearing upon whether the payment of a minimum wage should be required. It must be obvious, however, that such relative advantage and disadvantage is susceptible of infinite variation from instance to instance. No doubt recognition of that fact underlay, at least in part, the decision of Congress not itself to undertake to prescribe the precise conditions under which subminimum wages would be permitted, but, by Section 14 to commit the whole subject to determination by the Administrator case by case.

Acceptance of the decision below and of respondents' argument here would largely remove these infinitely variable considerations from the province of the Administrator and impose them upon the courts as tests of the Administrator's jurisdiction. The Act did place upon the courts a very substantial function in the enforcement of its requirements. But the adjustment of its requirements to the great variety of special considerations involved in the employment of learners, of apprentices, and of certain messengers was clearly made the function of the Administrator by Section 14. Adoption of a construction of the Act that would require the courts to take over that function, too, under the guise of passing on the Administrator's jurisdiction would be an unwarranted addition to an already heavy load. Such a construction is to be avoided where, as here, an alternative construction is available.

II.

Misconceptions Concerning the Employees' Participation in and Attitude Toward the Establishment of the Practices of Which the Administrator Complains

Without any direct support in the evidence, but by innunendo, implication and assumption, there has apparently entered into the case an impression that the practice of not recognizing trainees as employees is in conformity with the collective bargaining contracts made by the railway labor organizations and hence, presumably, meets with their approval. (CR. 366, 50, 58, 84.) It would be more accurate to say that in this respect the carriers have frequently failed fully to carry out their collective bargaining obligations under the Railway Labor Act as well as their obligations under the Fair Labor Standards Act.

At various times and on various carriers over a long period the railway labor organizations have been confronted with the problem of the nonrecognition of on-the-job learners as employees. They have sought with varying degrees of success to have them recognized and to have them paid at the established rates for the jobs, or, where appropriate, to have a suitable classification established. The record affords no basis for a full discussion of the situation and hence we must confine ourselves to the discussion of the rather meager evidence of record and let the position taken in this brief attest the fact that the organizations do not approve of nonrecognition.

The failure of a carrier to recognize trainees as employees covered by the agreement governing wages, rules, and working conditions (CR. 50, 366)

is just as consistent with a carrier refusal to grant employee demands as it is with employee approval of the practice and hence no such approval can be inferred. And the time as of which the accumulation of seniority begins (CR. 50, 366) is completely irrelevant to the determination of employee status. Seniority fixes relative rights among the individuals in a group, and hence it is immaterial to these relative rights whether they all date the accumulation of seniority from the date of entry on the job or all date it from the time they begin working beyond the probationary period. But deferment to the latter date serves to avoid the accumulation of rights by those who do not survive the probationary period. For a variety of reasons there are numbers of situations in which the beginning of the accumulation of seniority is not coincident with entry on the job.

There was read in evidence (CR. 84-85) a portion of what was described as a management-labor recommendation developed under the auspices of ODT. This recommendation was construed by the district court (CR. 369) as referring to trainee service as "pre-employment" service. It is submitted that this was a patent misconstruction of the recommendation. Careful examination of the text makes it clear that the recommendation distinguished sharply between off-job training and on-the-job training; that trainee service was referred to as on-the-job training; and that the term "pre-employment training" was applied exclusively to off-the-job training preceding entry upon the job either for trainee service or regular service. It thus appears that such inferences as are

to be drawn from this item of evidence point to a diametrically opposite conclusion from that drawn by the district court.

CONCLUSION

The decision below cannot be supported except on a construction which virtually reads Section 3(g) out of the Act. No such limitation is necessary; the language of the Act can properly be given its natural meaning, so long as it is understood from the context that the work referred to is the employer's work. When this is done the record, including the findings of the district court undisturbed on appeal, makes it plain that the trainees involved are employees. It is particularly important that this course be followed where, as here, any other course would confront the courts rather than the Administrator with the task of shaping the requirements of the Act to the infinitely varying circumstances of learner employment. The taking over of this task by the courts would frustrate the clearly expressed intent of Congress and would be detrimental to sound judicial administration.

Respectfully submitted,

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January 15, 1947.

APPENDIX

Organizations represented in the Railway Labor Executives' Association:

Brotherhood of Locomotive Firemen & Enginemen.
Order of Railway Conductors of America.
Switchmen's Union of North America.
Order of Railroad Telegraphers.
American Train Dispatcher's Association.
Railway Employes' Department, A. F. of L.*
International Association of Machinists.
International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
Sheet Metal Workers' International Association.
International Brotherhood of Electrical Workers.
Brotherhood Railway Carmen of America.
International Brotherhood of Firemen & Oilers.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.
Brotherhood of Maintenance of Way Employes.
Brotherhood of Railroad Signalmen of America.
National Organization Masters, Mates & Pilots of America.
National Marine Engineers' Beneficial Association.
International Longshoremen's Association.
Hotel and Restaurant Employees' International Alliance and Bartenders International League of America.

* Not counted as one of the 19 organizations since it represents certain other organizations individually listed.

SUPREME COURT OF THE UNITED STATES

No. 335.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, v. The Nashville, Chattanooga & St. Louis Railway.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, Administrator of the Wage and Hour Division, United States Department of Labor, filed this action in a Federal District Court to enjoin alleged violations by the respondent railroad of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act. 52 Stat. 1060, 1068. These sections require that minimum wages be paid to employees covered by the Act and that appropriate records be kept concerning their employment and pay. The railroad was charged with having violated the Act with regard to two types of alleged employees: First, persons in training to become yard and main line firemen, brakemen, and switchmen; second, others in training to become clerks, stenographers, callers, messengers, and other similar general miscellaneous workers. The District Court held that the first group were not "employees" and therefore were not covered by the Act. On this ground alone the injunction was denied as to them. It also denied relief as to the second group, clerks, etc., partly on this same ground. Another ground for denying relief as to the second group was the court's finding that the railroad "for several years past has been complying with the Act as to them and apparently intends in good faith to do so in the future." 60 F. Supp. 1004, 1007–1008. The Circuit

Court of Appeals affirmed. 155 F. 2d 1016, one judge dissenting. We granted certiorari because of the importance of the questions decided. — U. S. —.

The finding of the District Court that the railroad had been complying with the Act in good faith in its business relations with the trainee clerks, stenographers, etc. is not challenged. No argument is here made that this is not adequate support for denial of the relief granted as to this second group. Under these circumstances, we affirm the court's action in denying an injunction to enjoin violations of the Act as to these trainees. We therefore do not reach the question as to whether this group as a whole or any of the persons in it were or were not employees under the Act.

The sole ground for denying relief as to the persons training to become firemen, brakemen, and switchmen was that they were not employees. The findings of fact here as to the training of these trainees are in all relevant respects practically identical with the findings of fact in *Walling* v. *Portland Terminal Company* No. 336, this day decided. These findings of fact are not challenged. For the reasons set out in that opinion we hold that the Circuit Court of Appeals was not in error in holding that the persons receiving training in order to become qualified for employment as firemen, brakemen, and switchmen, are not employees within the meaning of the Fair Labor Standards Act.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *v.* Portland Terminal Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

This is an action brought by petitioner against respondent in a Federal District Court to enjoin an alleged violation of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. §§ 215 (a) (2), (5) which requires as to the employees covered by the Act the maintenance of records concerning their wages and the payment to them of minimum wages. The District Court denied the injunction on the ground that the particular persons involved were not employees, 61 F. Supp. 345, and the Circuit Court of Appeals affirmed on the same ground, one judge dissenting. 155 F. 2d 215. See also *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768. Certiorari was granted because of the importance of the questions involved to the administration of the Act. — U. S. —. The findings of fact by the District Court, approved by the Circuit Court of Appeals, and not challenged here, show:

For many years the respondent railroad has given a course of practical training to prospective yard brakemen. This training is a necessary requisite to entrusting them with the important work brakemen must do. An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. If accepted for the training course, an

applicant is turned over to a yard crew for instruction. Under this supervision, he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny. His activities do not displace any of the regular employees, who do most of the work themselves, and must stand immediately by to supervise whatever the trainees do. The applicant's work does not expedite the company business, but may, and sometimes does, actually impede and retard it. If these trainees complete their course of instruction satisfactorily and are certified as competent, their names are included in a list from which the company can draw when their services are needed. Unless they complete the training and are certified as competent, they are not placed on the list. Those who are certified and not immediately put to work constitute a pool of qualified workmen available to the railroad when needed. Trainees received no pay or allowance of any kind prior to October 1, 1943. At that time, however, the respondent and the collective bargaining agent, the Brotherhood of Railroad Trainmen, agreed that, for the war period, men who proved their competency and were thereafter listed as accepted and available for work as brakemen, should be given a retroactive allowance of $4 per day for their training period. The findings do not indicate that the railroad ever undertook to pay, or the trainees ever expected to receive, any remuneration for the training period other than the contingent allowance.

The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See *N. L. R. B.*

v. *Hearst Publications*, 322 U. S. 111, 128–129. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category. See *United States* v. *Rosenwasser*, 323 U. S. 360, 362–363.

Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation. This is shown by § 14 of the Act which empowers the Administrator to grant special certificates for the employment of learners, apprentices and handicapped persons at less than the general minimum wage.* The language of this section and its legislative history reveal its purpose. Many persons suffer from such physical handicaps, and many others have so little experience in particular vocations that they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment. On the other hand, to have written a blanket exemption of all of them from the Act's provisions might have left open a way for wholesale evasions. Flexibility of wage rates for them was therefore provided under the safeguard of adminis-

*"The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under Section 6 and subject to such limitations as to time, number, proportion and length of service as the Administrator shall prescribe, . . ." § 14 (1) Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. § 214 (1). See also § 13 (a) (7). § 14 (2) provides that handicapped persons may be employed at less than minimum wages where the Administrator permits. 52 Stat. 1060, 1068, 29 U. S. C. § 214 (2).

trative permits. This section plainly means that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the Administrator. On the other hand, the section carries no implication that all instructors must either get a permit or pay minimum wages to *all* learners; the section only relates to learners who are in "employment." And the meaning of that term is found in other sections of the Act.

Section 3 (g) of the Act defines "employ" as including "to suffer or permit to work" and § 3 (e) defines "employee" as "any individual employed by an employer." The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in rail-

roading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.

Accepting the unchallenged findings here that the railroads receive no "immediate advantage" from any work done by the trainees, we hold that they are not employees within the Act's meaning. We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law. We therefore have no case before us in which an employer has evasively accepted the services of beginners at pay less that the legal minimum without having obtained permits from the Administrator. It will be time enough to pass upon such evasions when it is contended that they have occurred.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In this case, as well as in the companion case, No. 335, we have a judgment of two courts based on findings with ample evidence to warrant such findings. It was solely on this ground that I agreed to affirmance in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, and on this basis alone I think the judgments in both these cases, Nos. 335 and 336, should be affirmed.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

v.

Portland Terminal Company, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 17, 1947.]

Mr. Justice Jackson, concurring.

I, too, would affirm this judgment. But my reason is not that stated in the Court's opinion.

I have never understood that the Fair Labor Standards Act was intended or fitted to regulate labor relations, except to substitute its own minimum wage rate for any that was substandard and an overtime rate for hours above the number it set. It, of course, like other statutes, can and should be applied to strike down sham and artifice invented to evade its commands.

But the complex labor relations of this country, which vary from locality to locality, from industry to industry, and perhaps even from unit to unit of the same industry, were left to be regulated by collective bargaining under the National Labor Relations Act. It would be easy to demonstrate from the Act's legislative history that such was the intention of Congress and that it had good grounds to believe this the tenor of the legislation. Organized employees on one side, free of employer domination or coercion, and employers on the other side best know the needs and customs of their trades; they know something of the strain their industry can stand; and after all, it is they who feel the effects. Given thus the machinery to change customs that had outlived their time or, in the alternative, to adjust wage rates to take account of those customs, it was, I think, our duty to pay at least some deference to the customs and contracts of an industry and not to apply the Fair

Labor Standards Act to put industry and labor in a legal strait jacket of our own design.

From the beginning it was apparent that there were but two ways of giving real force and meaning to this Act without throwing all industry and labor into strife and litigation. One was to give decisiveness and integrity in borderline cases to collective bargaining. *Cf. J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342. The other was to give strength and where possible decisiveness in doubtful cases to the studied rulings of the Administrator, as the Court also at moments seemed inclined to do. *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. Both of these considerations as bases for decision were thrown to the four winds in *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161.

This Court has foreclosed every means by which any claim, however dubious, under this statute or under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697; *cf. D. A. Schulte, Inc.* v. *Gangi*, 328 U. S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions.

In the view that the judicial function should pay some deference to findings of fact as to customs of industry in applying this Act, I favored affirmance of the award to miners in the case of *Tennessee Coal Co.* v. *Muscoda Local*,

321 U. S. 590, because two lower courts had made findings of fact that under the contracts and conditions in those particular iron mines the employees were entitled to have counted as working time certain periods spent in travel. The judgment was supported, too, by the rulings of the Administrator. Those reasons were rejected by a majority of the Court which went on to lay down rules of decision which take no account of contract or custom.

Then came the case of *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161, in which the relationships were fixed by a deep rooted custom in the industry of which both parties took account and embodied in collective bargaining agreements and which was reflected in the Administrator's rulings made at the request of the very union that was repudiating them. But a majority of the Court again rejected the contention that this Act was not intended to interfere with long-established customs which entered into collective wage agreements, and it reaffirmed a flat declaration as follows:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." 325 U. S. at 167; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 602.

The same doctrine was then pressed into other fields of industry by the decision in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U. S. —, June 10, 1946, which declared

certain time spent on the premises of the Pottery Company must be compensated "regardless of contrary custom or contract." Slip opinion, p. 8.

The Court evidently stands upon and reiterates the basic doctrine that the Act is one to regulate industry labor relations, for it says: "This Act contains its own definitions comprehensive enough to require its application to many persons and working relationships which prior to this Act were not deemed to fall within an employer-employee category."[1]

The claimants now before us ask to participate in the judicial largess. They believe that they are entitled to be paid for the time that they spent on the railroad's premises, under the railroad's direction, performing railroad labor, in order to learn to qualify for railroad jobs when the railroad might need them. The Court does not even attempt to distinguish the foregoing cases on which their claim is based.

This case again requires us to make a choice between grounds of decision similar to the choice that was open to us in the cited cases and I think it is timely for the Court to reconsider its approach to cases under this Act. We may purport to find grounds for denying these claims in an interpretation of the Act, although Congress never intended to regulate the subject at all. Or we can use as valid ground for denying these claims the concurrent findings by two lower courts of a good faith understanding of the parties, following a long-established custom of an industry whose labor relations have long been subject to collective bargaining. I concur only on the latter ground.

[1] I did not understand when I concurred in *United States* v. *Rosenwasser*, 323 U. S. 360, that it so held. It applied the Act to piecework employees. Piecework employment is a well-known form of employment that has existed perhaps as long as employment at a fixed hourly or daily wage. I understood, and still understand, the *Rosenwasser* case to hold only that this form of employment is not excluded from the terms of the Act.